No. 09-99004

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD DALE STOKLEY, Petitioner-Appellant,

vs.

CHARLES L. RYAN, et al., Respondent-Appellee.

Appeal from the United States District Court for the District of Arizona
Hon. Frank R. Zapata, Senior District Judge, Presiding
D.C. No. 4:98-cv-332-TUC-FRZ

Relevant ER Citations in Support of the Petition for Panel Rehearing and for Rehearing En Banc

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Richard Dale Stokley, Petitioner, vs. Charles L. Ryan, et al.,[1] Respondents.	No. CV-98-332-TUC-FRZ DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Richard Dale Stokley (Petitioner), a state prisoner under sentence of death, petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that he was convicted and sentenced in violation of the United States Constitution. (Dkt. 1.)[2] For the reasons set forth herein, the Court concludes that Petitioner is not entitled to habeas relief.

[1] Charles L. Ryan is substituted for Dora B. Schriro, as Acting Director, Arizona Department of Corrections. Fed. R. Civ. P. 25(d)(1).

[2] "Dkt." refers to documents in this Court's file. As is customary in this District, the Arizona Supreme Court provided to this Court the original trial and sentencing transcripts, as well as certified copies of the various state court records. (Dkt. 68.) The Court will utilize the following designations for these materials: "ROA I" refers to the six-volume record on appeal prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-92-278-AP); "ROA II" refers to the two-volume record on appeal prepared for Petitioner's petition for review of the denial of post-conviction relief (Case No. CR-97-287-PC); "ROA III" refers to the one-volume record on appeal prepared as a supplemental record for Petitioner's petition for review (Case No. CR-97-287-PC); "RT" refers to the court reporter's transcript.

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Richard Dale Stokley, Petitioner, v. Dora B. Schriro, et al.,[1] Respondents.	No. CV-98-332-TUC-FRZ DEATH PENALTY CASE **ORDER AND OPINION RE: PROCEDURAL STATUS OF CLAIMS**

Petitioner Richard Dale Stokley ("Petitioner"), a state prisoner under sentence of death, petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He alleges that he was convicted and sentenced in violation of the United States Constitution. (Dkt. 1.)[2] This Order addresses procedural bar and other issues raised by Respondents' answer to the petition.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 1992, Petitioner was convicted by a jury of two counts of kidnapping, one count of sexual conduct with a minor under the age of fifteen, and two counts of premeditated first degree murder in the deaths of two thirteen-year-old girls in a remote area in Southeast

[1] Dora B. Schriro, Director of the Arizona Department of Corrections, is substituted for her predecessor pursuant to Fed. R. Civ. P. 25(d)(1).

[2] "Dkt." refers to documents in this Court's file.

Claims B-1, I, J, K, and M are plainly meritless; these claims will also be dismissed with prejudice. Petitioner has fairly presented and actually exhausted Claims A-1, C, E, and G; these claims will be decided on the merits in a separate order following additional briefing.

Accordingly,

IT IS ORDERED that the following claims are **DISMISSED WITH PREJUDICE**: (a) Claims A-2, A-3, B-2, D, F-1, F-2, F-3, H-1, H-2, and L based on a procedural bar; and (b) Claims B-1, I, J, K, and M on the merits as a matter of law.

IT IS FURTHER ORDERED that, no later than **sixty (60) days** following entry of this Order, Petitioner shall file a Memorandum regarding the merits *only* of Claims A-1, C, E, and G. The Merits Memorandum shall specifically identify and apply appropriate AEDPA standards of review *to each claim for relief* and shall not simply restate facts and argument contained in the amended petition. Petitioner shall also identify in the Merits Memorandum: (1) each claim for which further evidentiary development is sought; (2) the facts or evidence sought to be discovered, expanded or presented at an evidentiary hearing; (3) why such evidence was not developed in state court; and (4) why the failure to develop the claim in state court was not the result of lack of diligence, in accordance with the Supreme Court's decision in Williams v. Taylor, 529 U.S. 420 (2000).

IT IS FURTHER ORDERED that no later than **forty-five (45) days** following the filing of Petitioner's Memorandum, Respondents shall file a Response Re: Merits.

IT IS FURTHER ORDERED that no later than **twenty (20) days** following the filing of Respondents' Response, Petitioner may file a Reply.

IT IS FURTHER ORDERED that if, pursuant to LRCiv 7.2(g), Petitioner or Respondents file a Motion for Reconsideration of this Order, such motion shall be filed within **fifteen (15) days** of the filing of this Order. The filing and disposition of such motion shall not toll the time for the filing of the merits briefs scheduled under this Order.

IT IS FURTHER ORDERED that the Clerk of the Court shall, pursuant to Fed. R. Civ. P. 25(d), substitute, as a Respondent, Dora B. Schriro for Terry Stewart as Director of the Arizona Department of Corrections. The Clerk shall update the title of this case to reflect

JUN 3 0 1998

Supreme Court

NOËL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

June 26, 1998

RE: STATE OF ARIZONA vs. RICHARD DALE STOKLEY
Supreme Court No. CR-97-0287-PC
Cochise County No. CR-91-00284A

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 25, 1998, in regard to the above-referenced cause:

(ERED: Petition for Review [on denial of Post Conviction Relief] = DENIED.

FURTHER ORDERED: Supplemental Petition for Review = DENIED.

NOEL K. DESSAINT, Clerk

TO:

Hon. Grant Woods, Arizona Attorney General
Attn: Paul J. McMurdie, Esq.
Eric J. Olsson, Esq., Assistant Attorney General - Tucson Office
Harriette P. Levitt, Esq.
Richard Dale Stokley, DOC 92408, Arizona State Prison-Florence
Hon. Matthew W. Borowiec, Judge, Cochise County Superior Court
Denise Lundin Glass, Clerk, Cochise County Superior Court
Alan K. Polley, Esq., Cochise County Attorney - Attn: Chris Roll, Esq.
Jennifer Might, Administrator, Arizona Capital Representation Project
[Information Copy Only]
Paula C. Nailon, Esq., Project Manager (Southern Counties), Arizona Capital Litigation Law Clerk Project [Information Copy Only]

6/26/98

FEB 20 RCVD

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FILED

Time_____M

FEB 19 1998

DENISE LUNDIN GLASS
CLERK SUPERIOR COURT
BY_____DEPUTY

SUPERIOR COURT OF ARIZONA
COUNTY OF COCHISE

Date February 18, 1998

RESTITUTION
APPEALS
BONDS REFUND/FORFEITURE
FINES/ATTY. FEES/RESTITUTION
CHANGE OF VENUE
JURY FEES
ATTORNEY APPT & CLAIMS
SUPPORT
DIVISION
MAILED

MEED 2-20-98

CASE: STATE OF ARIZONA, Plaintiff, vs. RICHARD DALE STOKLEY, Defendant.

MINUTE ENTRY ACTION: DECISION CASE NO: CR91-00284A

JUDGE HONORABLE MATTHEW W. BOROWIEC
DIVISION One
COURT REPORTER
ADDRESS & PHONE

DENISE LUNDIN GLASS, CLERK
By Stephanie L. Williams 2/19/98, Deputy
Docketed by _____

PRESENT: _____

The court having considered defendant's supplemental Rule 32 petition and the proposed findings and conclusions, and so finding and concluding, the findings and conclusions were executed this day.

By reason thereof, it is

ORDERED the supplemental Rule 32 petition is DENIED.

xc: County Attorney--Roll
Eric J. Olsson, Assistant Attorney General, Criminal Appeals Section, 400 W. Congress, Bldg. S-315, Tucson, AZ 85701-1367

ARIZONA SUPERIOR COURT

COUNTY OF COCHISE

STATE OF ARIZONA,

PLAINTIFF,

-vs-

RICHARD DALE STOKLEY,

DEFENDANT.

CR91-00284A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(THE HON. MATTHEW W. BOROWIEC)

Having reviewed the record and the submissions of the parties, and finding no valid ground for relief, IT IS ORDERED denying Stokley's supplemental petition for post-conviction relief. Specifically, the Court finds as follows:

Claim A, alleging ineffective representation due to trial counsel's failure to object to the autopsy photographs, is precluded under Rule 32.2(a)(2), Arizona Rules of Criminal Procedure, and A.R.S. § 13-4232(A)(2) because the Arizona Supreme Court rejected the factual basis for this claim on direct appeal. Because the appellate court upheld this Court's determination that the photographs were admissible, finding them relevant and not unfairly prejudicial, Stokley may not relitigate that factual issue here. *Id.* Thus the claim is precluded. Nor could this Court disaffirm the higher court's determination on the merits. Counsel is not ineffective for failure to object to admissible evidence. *See Strickland v. Washington*, 466 U.S. 668, 690-93, 104 S. Ct. 2052, 2066-67, 80 L. Ed. 2d 674 (1984) (to establish a denial of the constitutional right to counsel, defendant must affirmatively show that counsel's deficient performance resulted in prejudice to the defense)

Claim B, alleging ineffective representation for failure to adequately argue Stokley's alleged mental incapacity as mitigation for sentencing purposes, is precluded under Rule 32.2(a)(2) and A.R.S. § 13-4232(A)(2) because the Arizona Supreme Court rejected the factual basis of this claim on direct appeal. Moreover, Stokley offers nothing specific nor material concerning his mental condition that was not before this Court at sentencing or considered when the appellate court conducted its

54 2/18/98

independent review. Thus, this claim is also precluded for lack of sufficient argument, and it is meritless for lack of a showing of prejudice. *Strickland*, 466 U.S. at 690-93.

Claims C1, C2, C3, and C4, merely listed without argument or citation to supporting authority, are precluded for lack of sufficient argument. Moreover, because these counseled post-conviction proceedings do not derive from a plea of guilty or no contest, and because counsel has not refused to proceed, Stokley may not submit these or any other additional claims on his own.

Claims C1, C3, and C4 are also precluded because they could have been raised on direct appeal. Rule 32.2(a)(3), Ariz. R. Crim. P.; A.R.S. § 13-4232(A)(3). Claim C2, concerning venue, is precluded because the venue issue was finally adjudicated on the merits on direct appeal. Rule 32.2(a)(2); A.R.S. § 13-4232(A)(2).

Finally, the Court agrees with defense counsel's concession that Claims C1, C2, C3, and C4 are meritless.

For all the foregoing reasons, the supplemental petition for post-conviction relief is denied.

DATED this 18th day of February, 1998.

JUDGE OF THE SUPERIOR COURT

SUPREME COURT OF ARIZONA

THE STATE OF ARIZONA, Respondent, v. RICHARD DALE STOKLEY Petitioner.	Supreme Court No. CV-97-0203-SA Cochise County No. CR 91 00284A O R D E R

The Petition for Special Action filed by Richard Dale Stokley (Petitioner) came before the Court on June 24, 1997. On consideration,

IT IS ORDERED that the Court accepts jurisdiction of the Petition for Special Action.

The Court finds that the trial judge did not exceed his jurisdiction or act arbitrarily in entering the April 24, 1997 order vacating his previous order allowing Harriette Levitt to withdraw as counsel for Petitioner and reinstating her as his counsel. Therefore,

IT IS FURTHER ORDERED that the request to vacate the April 24, 1997 order is denied, and Harriette Levitt shall continue to represent Petitioner in the trial court.

IT IS FURTHER ORDERED that Ms. Levitt may file a supplemental petition for post-conviction relief. In that petition, she may raise any issue that, in her professional judgment, is not precluded and has merit, even though it may not have been included in her first petition for post-conviction relief.

6/27/97

#96-1727

FILED

Time _____ M

APR 29 1997

DENISE LUNDIN GLASS
CLERK SUPERIOR COURT
BY _____ DEPUTY

MAY - 1 RC

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BONDS: REFUND/FORFEITURE
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CHANGE OF VENUE
JURY FEES
ATTORNEY: APPT & CLAIMS
SUPPORT
DIVISION
X MAILED MEED 4-29-97

SUPERIOR COURT OF ARIZONA
COUNTY OF COCHISE
Date **April 24, 1997**

CASE: **STATE OF ARIZONA**, plaintiff, vs. **RICHARD DALE STOKLEY**, defendant.

MINUTE ENTRY ACTION: **DECISION** CASE NO: **CR91-00284A**

JUDGE **HONORABLE MATTHEW W. BOROWIEC**
DIVISION **One**
COURT REPORTER
ADDRESS & PHONE

DENISE LUNDIN GLASS, CLERK
By **Stephanie L. Williams 4/29/97**, Deputy
Docketed by _____

PRESENT: _____

Various motions have been filed in this case since this court denied defendant's petition for post-conviction relief on March 6, 1997.

Defendant filed a motion to extend deadline for filing petition for review, by counsel, Harriette P. Levitt, Esq. on March 11, 1997. By motion to withdraw filed that same day counsel was allowed to withdraw. Therefore, this court assumes Harriette P. Levitt is no longer concerned with this matter. The state has requested that Ms. Levitt be reinstated as there remains only a motion to reconsider and a petition for review. The state's position is well taken.

It is ORDERED Harriette P. Levitt is reinstated as counsel of record; the order granting permission to withdraw is VACATED.

It is further ORDERED the claim for attorney's fees be paid.

It is further ORDERED the motion to extend deadline for filing petition for review or in the alternative a motion for reconsideration, is GRANTED, extending deadline to May 15, 1997.

Defendant has requested co-counsel for completion of the Rule 32 petition. It appears that matter has been completed, therefore, it is

COPY OF ORIGINAL

ORDERED the request for co-counsel is DENIED.

The court examined defendant's motion to remove the Attorney General's Office, with alternative prayers, for prosecutorial misconduct. The court finds none, therefore, it is

4/29/97

ORDERED the motions in the alternative, are DENIED.

The court considers all pending matters in this court resolved.

xc: County Attorney--Roll
Eric J. Olsson, Assistant Attorney General, Criminal Appeals Section, 400 W. Congress, Bldg. S-315, Tucson, AZ 85701-1367
Harriette P. Levitt, Esq., 485 S. Main Avenue, Tucson, AZ 85701
Carla G. Ryan, Esq., 6987 North Oracle Road, Tucson, AZ 85704
Roylan Mosley--Appeals Clerk
Court Administration--Peggy

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JURY FEES
ATTORNEY: APPT & CLAIMS
SUPPORT
DIVISION
MAILED

SUPERIOR COURT OF ARIZONA
COUNTY OF COCHISE
Date **March 6, 1997**

CASE: **STATE OF ARIZONA** vs. **RICHARD DALE STOKLEY**

MINUTE ENTRY ACTION: **DECISION ON PETITION FOR POST-CONVICTION RELIEF** CASE NO: **CR91-00284A**

JUDGE **HONORABLE MATTHEW W. BOROWIEC**
DIVISION **ONE**
COURT REPORTER
ADDRESS & PHONE

DENISE LUNDIN GLASS, CLERK
By **Roylan D. Mosley, 3/6/97,** Deputy
Docketed by _____

PRESENT: ----------

The Court having considered defendant's Petition for Post-Conviction Relief, finds and concludes as follows:

1. The issue of ineffective assistance of counsel is centered on trial counsel's failure to object to the jury panel and the time of jury selection, thereby failing to preserve this issue on appeal. This basis relates to defendant's Motion for Change of Venue, considered by the trial court and denied.

The denial of change of venue was extensively considered by the Arizona Supreme Court. Further, great care was taken in the selection process. This Court is unaware of any basis to challenge the jury selection. Defendant presumes prejudice by reason of pretrial publicity but demonstrates none.

The issue of ineffective assistance of counsel on the claimed ground was at least tacitly dealt with therefore adjudicated on appeal, and certainly waived both on trial and appeal. On this issue, the defendant is precluded from raising it at this point by Rule 32.2, Rules of Criminal Procedure. The issue of change of venue was extensively dealt with by the Arizona Supreme Court, the focus of the jury challenge argument.

2. Defendant raises the issue of suppression of Brady material pertaining to Mr. Brazeal's link to a satanic cult, which information defendant claims would be used to impeach Mr. Brazeal and to demonstrate Mr. Brazeal's overpowering influence over the defendant. Mr. Brazeal did not testify in defendant's trial. The State denies sufficient evidence of this matter to require disclosure.

Even if true, considering the persuasive and compelling evidence against the defendant, the newly discovered evidence would likely would not have altered the verdict. This evidence was not exculpatory.

By reason of the foregoing, it is

ORDERED the Petition for Post-Conviction Relief is **DENIED.**

xc: Harriett P. Levitt, Esq., 485 S. Main Ave., Tucson, AZ 85701-1117
Eric J. Olsson, Esq., Assistant Attorney General 400 W. Congress Bldg S-315 Tucson, AZ 85701-1367
County Attorney - Festa
Richard Dale Stokley #92408 ASPC - Florence - CB6, P. O. Box 629, Florence, AZ 85232
Noel K. Dessaint, Clerk of Supreme Court 1501 W Washington Ste 402 Phoenix, AZ 85007-3329

3/6/97

I) .: Richard Dale Stokley)
ADC#92408 Unit CB6
Arizona State Prison
P.O. Box 8600
Florence, AZ 85232

CASE NO.
CR91-00284A
(death penalty)

To: The Honorable Judge Matthew Borowiec
Cochise County Superior Court

May 9, 1997

Your Honor:

I am writing to express to the Court that it is unconscionable that the Court remove Ms. Carla Ryan from my case and reassign Ms. Harriette Lavitt to my case. It is apparent that there is no attorney client relationship between Ms. Levitt and myself. I have registered a complaint with the State Bar of Arizona, and Ms. Levitt herself even asked to be removed from my case, as was granted by the Court. Ms. Ryan willfully accepted to handle my case, and demonstrated that she would look after my interests to the fullest extent, which Ms. Levitt obviously has not.

I now find myself bridled with an attorney whom I could not agree with on the issues at hand or to be raised, and who has made unprofessional and biased statements concerning me, my case, and my chances of being executed, and also filed the most cursory excuse for a Rule 32 Petition possible in a death penalty case, thus "giving up on a client" who is in a life or death situation.

The Attorney General's office should have no say in how this Court is run, who represents me, or how they do so. And as a matter of fact, in the State's MOTION TO VACATE DISMISSAL OF COUNSEL, OR ALTERNATIVELY, TO CLARIFY ROLE OF SUBSTITUTED COUNSEL, submitted to this Court on March 17, 1997, it is erroneously claimed, on page 2- lines 21-22, that "Mr. Stokley's dissatisfaction apparently did not arise until he learned the petition had been unsuccessful". But let's get the facts all straight.

Ms. Levitt had promised me that she would keep me informed of what was going on with my case, but she was not forthcoming. I received a copy of her "Rule 32 Petition" AFTER she filed it, and had no chance to express my dissatisfaction before then. Yet I sought advice from other sources and took action as soon as a layman could.

I have written this Court once before, on February 15, 1997, laying out the entire picture for the Court. And I am once more sending a copy of said letter. Since I wrote the Court on the above mentioned Date, and the Court issued its ruling on March 6, 1997, it can hardly be said that my dissatisfaction apparently did not arise until I had learned the petition had been unsuccessful.

I have the most stringent desire to have Ms. Carla Ryan be reappointed to represent me, and have already in a short time developed a proffessional rapport with her. For the Court to assign Ms. Levitt, who does not have my best interests at heart, is nothing short of signing my warrant of execution. She did not raise or preserve a significant number of issues which are crucial to my case. I therefore plead with this Court not to leave my fate in her hands, but to allow Ms. Ryan to represent me.

Most Humbly,

Richard Dale Stokley

Richard Dale Stokley

cc:file

LETTER OF PROTEST

From: Richard Dale Stokley
ADC#92408 Unit SMU II
Arizona State Prison-Eyman
P.O. Box 3400
Florence. AZ 85232

Supreme Court No.
CR-97-0287-PC

Cochise County No.
CR-91-00284A

To: Noel K. Dessaint. Clerk
Arizona Supreme Court
402 Arizona State Courts Building
1501 West Washington
Phoenix. AZ 85007-3329

Monday. February 2, 1998

Dear Mr. Dessaint:

This is a letter of protest. for the record. since I have been shown that this court has no interest in anything I have to say. This was clearly demonstrated when the Special Action filed on my behalf by Carla Ryan was denied and I was left with a do-nothing court-appointed attorney who has made it clear through both actions and words that she has no intention of doing any more in my case than merely going through the motions.

It indeed appears that this court has scoffed at and denied my right to a full and fair hearing on appeal (County Court, too). Could it be that since death-penalty cases have now become so politicized that the courts have adopted an agenda of expediting executions at the expense of all else, including the right of the condemned to be heard?

Harriette Levitt, the attorney appointed to my case, did as little as possible in preparing my Rule 32, raising a mere two issues. She claimed that there were "no more issues that could be raised in my case". So I started complaining to the county court and the State Bar. This is a death-penalty case and as such it should be treated seriously.

When she heard I'd complained to the State Bar Levitt made a Motion to Withdraw and it was granted, and rightly so. Carla Ryan was appointed to replace her, which was most certainly acceptable to me. But then I learned that it's really the Attorney General's Office that controls these appointments. They embarked on a childish and improper personality war, in which they praised Harriette Levitt while denigrating Carla Ryan in court documents.

Subsequently, Judge Borowiec caved in easily and let the AG dictate who would represent me. This was wrong, should not have occurred, and this court erred in not correcting it as we asked in the Special Action. This appeal is about life or death, and should not be about personalities or interference by the AG because they prefer one attorney over another. Sure they'd prefer an attorney who does nothing over one who fights. But isn't that what the adversarial system is all about?

Further, if this court thinks that ordering Levitt to file Status reports may have motivated her, it is mistaken. She has now, running true to form, filed this "Amended Petition" which adds TWO MORE ISSUES ONLY. I ask you, if, as Levitt told me last year, "there were no more issues that could be raised in my case", then where did these other two come from? Me, that's where. But if two, then why not three or five or fifteen?..... Who knows what has been neglected and left out?

After the Special Action I wrote Levitt with 17 potential issues and brought up some other serious matters which she arrogantly ignored, asked her to get an investigator appointed and asked for the opportunity to review the transcripts because I don't believe Levitt really has. She raised two (of my) issues in an Amended Rule 32, proceeded to mention (tho not fully present) and to even adjudicate (a habit of hers in court documents) 4 others for the court, and either ignored or refused the rest. I try to defend myself and she has thrown pitfalls every step of the way. This is one example of why the death penalty is ARBITRARY. Levitt is most certainly not representing me in a conscientious and responsible manner. My fate has been put into her hands, to a great extent. It is a huge responsibility for any one person to be entrusted with, and when they fail to live up to that responsibility, that's where the ARBITRARINESS comes in. You justices should know that all too well.

Levitt even stated, in her Motion to Withdraw (Superior Court) that the right to effective assistance of counsel does not (in her opinion) extend to the appeal process. In so stating she effectively exposed her attitude, and her obvious intention is to indifferently cause me to lose my last opportunity to raise and/or preserve any issues for the record. We all know that if I were wealthy this would not be happening.

This is a violatiop of my rights, is unethical, and this court has allowed it to continue even though I tried all I could to have the situation remedied. Why?

When the Special Action was denied it left me shocked and wondering what I could do. But I have not lost my voice. The Amended Rule 32 (Appellant's Reply to State) is due on February 12, next week, and I wish to go on record BEFORE the judge rules on it or even receives it.

I am not placated nor am I satisfied with a mere two additional issues being raised. I consider it a farce and an outrage that I have received such shabby and negligent representation from this court-appointed attorney, Harriette Levitt, and I feel very strongly that my basic rights have been violated by this attorney as well as the courts by forcing her on me. So much for your "justice".

In Protest, Richard Dale Stokley

cc:file

Cary Sandman, Esq.
PCC #50692 SB #004779

LAW OFFICES
WATERFALL, ECONOMIDIS, CALDWELL,
HANSHAW & VILLAMANA, P.C.
Williams Center, Eighth Floor
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Tucson, AZ 85711
(520)790-5828

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RICHARD DALE STOKLEY, Petitioner, vs. TERRY L. STEWART, et al. Respondents.	NO. CIV 98-332-TUC-FRZ **PETITIONER'S TRAVERSE**

Petitioner, Richard Dale Stokley, by and through undersigned counsel hereby submits his Traverse.

DATED this 24th day of January, 2000.

WATERFALL, ECONOMIDIS, CALDWELL,
HANSHAW & VILLAMANA, P.C.

By _____
Cary Sandman
James W. Stuehringer
Attorneys for Petitioner

claim of constitutionally deficient performance by trial counsel. *Caro v. Calderon,* 159 F.3d 1185, 1188 (9th Cir. 1998). In his Supplemental Rule 32 Petition, a hearing was requested, where evidence of prejudice from the deficient performance of trial counsel could be presented. RA 3rd *supra*. When the facts needed to establish relief are not available at the time of the filing of the Rule 32 Petition, state law required a hearing to determine the facts underlying the claim for relief. *State v. Schrock,* 149 Ariz. 433, 441 (1986)("Rule 32 has as its aim the establishment of proceedings to determine the facts underlying a defendant's claim for relief when such facts are not otherwise available." Under these circumstances, "a hearing should be held to allow the defendant to raise the relevant issues and to make a record for review.") Accordingly, the trial court should have granted Petitioner a hearing, where evidence to establish prejudice could have been presented. Its failure to due so, renders its alleged state law basis for dismissal of the Rule 32 Petition, inadequate. Therefore, neither state law ground set forth in the trial court's order ("preclusion" or "lack of argument of prejudice") was *adequate* to bar federal review of the claim. See, e.g., *Wallace v. Stewart,* 184 F.3d 1112, 1115, n. 4 (9th Cir. 1999).

2. Even If There Was a Procedural Default of The Claim, The Default Is Excused Because There Is Cause for The Default and Prejudice Resulting From The Underlying Violation of Federal Law.

The Cause Issue

There is "cause" for a procedural default when an external impediment makes compliance with a State procedural rule impracticable. In the face of such an impediment, a default is excused upon the requisite showing of prejudice. *Murray v. Carrier,* 477 U.S. 478, 487-88 (1986); *Coleman v. Thompson, supra,* at 501 U.S. 752-753. "Cause" is any legitimate excuse for a default. *Thomas v. Lewis,* 945 F.2d 1119, 1123 (9th Cir. 1991). Here, the Petitioner can readily demonstrate "cause" for any alleged default in the ineffective assistance of counsel claim.

WATLING, CHRISTOPHERSON, CROWELL, HANSEN & VILLEMAIN, P.C.
5210 E. Williams Circle, Suite 800
Tucson, AZ 85711
(520)790-5828

In this case, a procedural default, if any, is attributable to Petitioner's state post-conviction counsel, Harriet Levitt.[5] The Respondents apparently anticipated that the Petitioner would charge that Levitt's conduct was the cause for any default, and hence, in their memorandum, the Respondents argue that there is no right to effective assistance of counsel in state collateral proceedings. Therefore, Respondents claim attorney Levitt's conduct, even if ineffective, cannot constitute sufficient cause to excuse a procedural default. The Petitioner acknowledges that (while the parameters of the "exceptions" to the rule remain open) the Supreme Court has held that generally there is no right to counsel in state collateral proceedings. *Coleman v. Thompson,* 501 U.S. at 752-755.[6] In the absence of such a right to counsel, in *Coleman,* the Court refused to find cause when cause was premised upon a claim of ineffective assistance in state collateral proceedings. *Id.* (attorney's "error" was not "cause" to excuse the default, because it occurred in proceedings in which the defendant had no constitutional right of counsel.)

Lest there be any confusion, Petitioner's position should be made clear at the outset: Petitioner is not merely claiming that he had a right to effective assistance of counsel in his state collateral Rule 32 proceedings.[7] Insofar as Petitioner is concerned, whether attorney Levitt was ineffective or not, can be considered wholly immaterial to

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[5]Having said this, as explained below, both the state prosecuting authority and the Arizona courts were implicitly, if not directly involved in erecting the "external impediments" which caused any defaults.

[6]For example, in *Coleman,* the Court expressly reserved the question with respect to whether there must be an exception to the rule that there is no right to counsel in collateral proceedings in those cases where state collateral review is the first place a prisoner can fairly present a challenge to his conviction. *Id, at 501 U.S. 755.*

[7]Elsewhere in this Traverse, the Petitioner asserts a right to effective assistance of counsel, but no claim of a right to the effective assistance of counsel in state collateral proceedings is made here. *See footnote 13, supra at p. 20.*

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the disposition of the cause issue. In this case, the resolution of the cause issue need not turn on the existence of a right to effective assistance of counsel in collateral proceedings.

Here, the determination of the cause issue rests on a wholly separate question: whether any client, is bound by a lawyer's default, where the lawyer's action is clearly demonstrated to arise in the absence of an attorney-client relationship; or where due to irreconcilable conflicts, the lawyer cannot be considered the client's "agent" with respect to the default. Where it can be established that a lawyer was not acting as the Petitioner's agent with regard to the default, there is a consequent demonstration that impediments external to the defense prevented the defendant's compliance with the procedural rule, and cause exists to excuse a procedural default. These principles of agency law are controlling upon the determination of "cause" in the case *sub judice.* The central role of agency law in the determination of the cause issue is explained in the Supreme Court's decision in *Coleman, supra.*

> The principles of agency law formed a critical part of *Coleman's* analysis of the question whether ineffectiveness of counsel can constitute "cause." The Court held that [in state collateral proceedings] "[a]ttorney ignorance or inadvertence is not 'cause' [for purposes of the procedural default doctrine] because the attorney is petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Id.* at 753. Expressly invoking agency law, the Court stated: "In a case such as this, where the alleged attorney error is inadvertence in failing to file a timely notice, such a rule [*i.e.*, that a "'lawyer ceases to be an agent of the petitioner'" when he performs ineffectively] would be contrary to well-settled principles of agency law. See, *e.g.*, RESTATEMENT (SECOND) OF AGENCY § 242 (1958) (master is subject to liability for harm caused by negligent conduct of servant within the scope of employment)." *Coleman v. Thompson, supra*, 501 U.S. at 754.

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> Although the *Coleman* Court did not explicitly address the ramifications when an attorney breaches or acts outside the agency relationship, it is evident – again, as a matter of "well-settled principles of agency law" (*id.*) – that a principal cannot be held liable for the actions of an agent under these circumstances. *See, e.g.,* RESTATEMENT, *supra*, § 219(2) (except under certain specified circumstances, "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment"). The rule applied in *Coleman* was carefully tailored to reflect this latter principle of agency law. The Court held that "[i]n the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made *in the course of the representation.*" 501 U.S. at 754 (emphasis added.) *Accord id.* at 753 ("Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, *in furtherance of the litigation*, and the petitioner must 'bear the risk of attorney error.'" (emphasis added)).
>
> As these statements suggest, there is no justification for (and the Court's own agency law analysis precludes) holding a habeas corpus petitioner liable for attorney errors committed when the attorney was functioning outside "the course of the representation" or was not acting "in furtherance of the litigation" (*id.* at 753). Under these circumstances, the attorney's actions must be deemed "something *external* to the petitioner, something that cannot be fairly attributed to him" (*id.*) and therefore a basis for finding "cause" under the procedural default doctrine.

Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (hereinafter Liebman) Vol. 2, p. 1103-04 n. 39.

A habeas petitioner must be deemed to establish cause for a default when he/she can demonstrate that it was caused by a lawyer acting outside of the agency relationship. *Hollis v. Davis*, 941 F.2d 1471, 1479 (11th Cir. 1991). In *Hollis,* the attorney acted outside the agency relationship, when he refused to challenge the racial

composition of the county jury list out of concern for his own interests and reputation. There, the court noted that even if Mr. Jinks' representation was not constitutionally ineffective under *Strickland*, if he did not object to the racial composition of the county's jury list out of fear of community reaction or loss of practice, such failure would be considered outside of the agency and be deemed an "objective factor external to the defense" which is "cause" for the procedural default).

Consistent with the foregoing, agency rules have been applied to excuse defaults by state post-conviction lawyers acting outside the scope of their agency. *Ford v. Lockhart,* 861 F.Supp. 1447, 1452 (E.D. Ark. 1994) (a state prisoner must bear the risk of attorney error that results in a procedural default only if the lawyer was his or her agent when acting, or failing to act, in furtherance of the litigation, and therefore a lawyer acting outside the agency relationship demonstrates cause for any default). In *Ford*, the court excused a default of an ineffective assistance of trial counsel claim, where the post-conviction lawyer who failed to properly raise the claim had acted outside the scope of his agency. *See also, Clemmons v. Delo*,124 F.3d 944, 948 (8th Cir. 1997) (recognizing the significance of counsel's disregard of the agency relationship, state post-conviction counsel's failure to raise a valid *Brady* claim did not bar federal court consideration of the claim).

The pivotal role of agency law to the determination of "cause" has been recognized in analogous circumstances in the Ninth Circuit. *Deutscher v. Angelone,* 16 F.3d 981 (9th Cir. 1994) (while acknowledging the Circuit's view, that there is no right to counsel in collateral proceedings, the court refused to bar the filing of a second habeas petition, and found such filing not an abuse of the writ, where the lawyer filing the first habeas petition had acted outside of the agency relationship).[8]

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[8]The standard for cause and prejudice in an "abuse of the writ" case at issue in *Deutscher, supra,* is identical to the cause and prejudice standard to be applied in Petitioner's case, where the issue is one of procedural default. *McClesky v. Zant*, 499 U.S. 467, 489-90 (1991).

As explained below, Petitioner's last appointed lawyer for his state post-conviction proceeding never established an attorney-client relationship with him, and due to "irreconcilable" conflicts, his court appointed lawyer was not acting as his agent. Accordingly, any defaults committed by that lawyer are not binding upon him in these habeas proceedings.

Following the disposition of Petitioner's appeal from his conviction, the Arizona Supreme Court issued its Mandate, and thereafter, on January 31, 1996, an automatic Notice of Post-conviction Relief was filed on behalf of the Petitioner pursuant to A.R.C.P. 32.4(a). RA 2nd No.1. Harriet Levitt was appointed as the Petitioner's post-conviction counsel on April 17, 1996. RA 2nd 7. Levitt's billing records reflect that it was not until December 1996, over eight months after she was appointed to represent Petitioner, that she commenced any review of the trial and sentencing transcripts. The billing records further show that case transcripts were reviewed during December 20 through December 26. On the same day she finished her review of the transcripts, a mere 4 hours of legal research was conducted with respect to **all** possible post-conviction legal issues; and by December 27, after the expenditure of only an additional 3.5 hours, the entirety of the Rule 32 Post-Conviction Petition was prepared for filing. RA 2nd 19 and RA 2nd 11. No investigation was conducted. The minimal services rendered makes a mockery of the representation owed indigent defendants in post-conviction proceedings.

Antecedent to filing the January 1997 petition for post-conviction relief, Levitt had one brief telephone conference with the Petitioner, which took place just after she was appointed, at a time when she had performed no substantive work in the case, and she had no knowledge of what the case was about. RA 2nd 19. No client interview was ever conducted prior to or after the filing of the Petition. The sole brief phone call referred to, occurred only because Petitioner was able to place a collect call to Levitt's

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office. (See Billing Records, RA 2nd 19 and RA 3rd 6).

Levitt was the attorney in "name" only. Prior to her filing of the Rule 32 Petition, she never had any substantive communication with the Petitioner, and accordingly, no attorney-client relationship existed. A defendant's communication with counsel is critical to the attorney's representation, and lacking communication there is a complete denial of counsel. *Geders v. United States*, 425 U.S. 80, 91 (1976); *Lackin v. Stine,* 44 F.Supp.2d 897, 900 (1999) (state appointed counsel was not the defendant's counsel; because without communication there was no attorney); *Mitchell v. Mason,* 60 F.Supp.2d 655, 659 (E.D. Mich. 1999) ("meaningful, confidential conversation creates the attorney-client relationship [and] without communication the attorney can only posture as one, the communication derives an attorney, a necessary element of composing a lawyer").

Levitt never even once met to confer with the Petitioner before or after filing the Petition, and demonstrably, none of the issues raised (or not raised) in that Petition were ever discussed with the Petitioner. Absent an attorney-client relationship, there was no agency and no action or inaction, or "procedural default" of the agent Levitt that could be binding upon Petitioner. Her actions were "external" to the Petitioner and excuse any default. *Ford v. Lockhart, supra*; *Deutscher v. Agelone, supra*. Hence, whether or not Petitioner had a constitutional "right to counsel" – and even assuming he did not – facts (as here) which demonstrate a "constructive denial of counsel," [*Geders v. United States, supra; Lackin v. Stine, supra.*] also are sufficient to demonstrate a lack of "agency" for purpose of procedural default analysis.

Following Petitioner's receipt of the post-conviction petition, and prior to the trial court's disposition of the Petition, on February 15, 1997, Petitioner wrote a letter to the trial court, directed to the judge considering the petition. Petitioner related to the court that following his receipt of the Petition, he spoke to Levitt by phone expressing his

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concerns.[9] Petitioner related to the court that in response to his phone call, Levitt stated "this Rule 32 won't last too long, and then my case will go to federal court where I will lose . . . and I will probably be executed withing 2-3 years." Petitioner was rightly concerned with the spiteful and uncaring tone of Ms. Levitt's response. Petitioner expressed to the trial court his legitimate belief that Levitt was not fulfilling the role of counsel. Petitioner was correct. Levitt had not acted as Petitioner's counsel. *Lackin v. Stine, supra; Mitchell v. Mason, supra*. Petitioner informed the court that his post-conviction counsel's actions violated his constitutional rights, and he requested a stay of the proceedings and appointment of post-conviction counsel. RA 2nd 31 at Exhibit H. The trial judge refused to even read the letter and he had his secretary transmit it to Levitt, for her handling.

After she received notice of Petitioner's complaints, Levitt spent a grand total of one hour reviewing the state's objections to the post-conviction petition and preparing a written reply, and that concluded her "advocacy" on behalf of the Petitioner. RA 2nd 19. Within approximately sixty days of the filing of the Petition, the trial judge denied the post-conviction petition on March 6, 1997. On March 10, Levitt (apparently recognizing she had an ethical conflict of interest) moved to withdraw as counsel citing a "complete breakdown of the attorney-client relationship." RA 2nd 16. Levitt's admission as to the lack of an attorney-client relationship was, by definition, completely accurate. *See, Mitchell v. Mason, supra*. (In the absence of communication, there is no attorney-client relationship.) The trial court finding "good cause" for the motion to withdraw, granted the motion to withdraw and appointed Carla Ryan ("Ryan") as new post-conviction counsel for the Petitioner. RA 2nd 17.

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[9]This call was again a collect call initiated by Petitioner. RA 2nd 19.

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The State of Arizona, obviously concerned that new post-conviction counsel for Petitioner would attempt to raise issues that could be exhausted and then reviewed in these now pending federal habeas proceedings, and aspiring to limit this Court's power of review; filed a motion objecting to the appointment of Ryan. RA 2nd 20. In its role as the prosecuting authority, the state intervened in the matter of Petitioner's representation, and it insisted that the trial court require that the indigent Petitioner be represented by a lawyer with whom Petitioner had no attorney-client relationship, under circumstances where the conflict between lawyer and client was "irreconcilable."

On April 15, 1997, Ryan filed a Motion for Reconsideration and Request to Amend the Petition for Post-conviction Relief. RA 2nd 31. In the Request to Amend the Rule 32 Petition, Ryan identified the issue that has central importance to the outcome of the pending habeas proceedings, to wit: **whether Petitioner received ineffective assistance of counsel, when counsel failed to have Petitioner complete a neuropsychological evaluation after it was discovered that Petitioner was brain damaged.** RA 2nd 31.

On April 29, 1997, the trial court issued a Minute Entry order noting that, based upon the state's request, Levitt, would be reinstated; and the prior order permitting her to withdraw was vacated. RA 2nd 33. At the time the trial court made this decision, there was no evidence in the record from any source that the irreconcilable ethical conflict between the Petitioner and Levitt had been resolved, and it had not been.

Whether or not Petitioner had a constitutional right to counsel in his state post-conviction proceedings, and even assuming *arguendo* that he did not have such right: the state was not permitted to "force" Petitioner to retain counsel with whom he had an "irreconcilable conflict." Forcing a defendant into such representations by definition creates an external impediment which makes compliance with the state procedural rules highly impracticable and constitutes cause for any defaults which

result. As noted above, whether or not Petitioner had a constitutional "right to counsel" – and even assuming he did not – facts (as here) which demonstrate a "constructive denial of counsel," [*Geders v. United States, supra; Lackin v. Stine, supra.*] also are sufficient to demonstrate a lack of "agency" for purpose of procedural default analysis.

Following Levitt's reinstatement, Petitioner submitted yet another letter to the trial court, objecting to Levitt's reinstatement; imploring the court that there was no attorney-client relationship between him and Ms. Levitt. He informed the court that there had been no communication with Levitt and that she had prepared and filed the initial Rule 32 Petition without his approval. As noted, actions by purported counsel under these circumstances could never be binding upon the Petitioner. *Ford v. Lockhart, supra; Deutscher v. Angelone, supra; Liebman, supra.* Once again, the trial court refused to consider the letter from the Petitioner and he forwarded the letter to Levitt unread.

After her reinstatement, with the acquiescence of both the Arizona prosecuting and judicial authorities, Levitt acted outside her authorized agency with the Petitioner, and she vigorously advocated (not for the Petitioner) but rather for the prosecution. The proof of this fact is demonstrated by the following.

As noted above, prior to the reinstatement of Levitt, Ryan had filed a Request for Leave to file an Amended Rule 32 Petition; wherein she identified *inter alia,* a critical issue: that trial counsel was ineffective for failing to obtain a neuropsychological examination to explain the role Petitioner's brain damage and related diminished capacity had in his involvement in the tragic murders. This issue has compelling merit.[10] After her reinstatement, on May 6, 1997, Levitt filed a Petition for Review with the Arizona Supreme Court of the trial court's denial of the Rule 32 Petition. RA 2nd 36.

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[10]See, the discussion of "prejudice" at pp. 21-32 below.

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Within the Petition for Review, Levitt, acting as the state's advocate (certainly **not** the Petitioner's) presented legal and factual arguments against each and every one of the Rule 32 issues that had been raised by the Petitioner in the Request for Leave to Amend, including, the all important claim concerning the ineffective assistance of trial counsel. Levitt advocated as the prosecutor, urging dismissal of this meritable claim, without conducting any investigation of the merits of the issue. Clearly, Levitt was acting outside the scope of her agency in pressing for the dismissal of Petitioner's meritable claims, and, her actions were "external" and are not imputable to the Petitioner in these proceedings.

The foregoing could not better present that the Petitioner faced impediments external to the defense which prevented his compliance with state procedural rules, when: (i) at the prosecutor's insistence Petitioner was forced to accept representation from a lawyer with whom he had an irreconcilable conflict, and (ii) that lawyer (without any investigation) argued that his presented meritable claims should be dismissed as frivolous.

Further evidencing Levitt's departure from the scope of her agency, in the Petition for Review, she presented as among her primary concerns, her own interests and reputation (over and above what should have been her interest in the purported client) by presenting detailed arguments defending herself from the ineffective assistance of counsel accusations that had been made against her in the proceedings. RA 2nd 36. The placement of her own interests above the Petitioner's, further demonstrates that she was acting outside of the scope of her agency, and that her actions were external to the defense. *Hollis v. Davis,* at 941 F.2d 1479 (lawyer acting out of concern for his/her own interest, to the detriment of defendant's interest, is factor external to the defense). Recognizing the ethical conflict that she had, in the Petition for Review, Levitt at least reminded the court that she had no attorney-client

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relationship with the Petitioner, and she implored the court to reinstate attorney Ryan as Petitioner's counsel. RA 2nd 36.

While the above Petition for Review filed by Levitt was pending; with Ryan's assistance, Petitioner instituted an interlocutory appeal seeking the Arizona Supreme Court's review of the trial court's decision reinstating Levitt as counsel. On June 27, 1997, the Arizona Supreme Court accepted jurisdiction of the appeal; it determined that the ethical conflict should be ignored and left Levitt in place as Petitioner's lawyer. However, recognizing possible merit in the Petitioner's argument, that issues of significant import were ignored in the original Rule 32 Petition, the Arizona Supreme Court, *sua sponte*, suspended the Rules of Criminal Procedure, and granted Levitt the right to file a supplemental Rule 32 Petition raising any issue not included in the original Petition. RA 2nd 40.

Thereafter, as she had in the past, Levitt refused to meet with the Petitioner. Her billing records establish no such meeting ever occurred. RA 3rd 6. Under these circumstances, out of desperation, in July and August 1997, Petitioner wrote three letters to Levitt requesting a copy of the record and transcripts so that he could assist in identification of issues for the supplemental Rule 32 Petition. Levitt refused to permit the Petitioner even a temporary review of the record and transcripts; claiming she "needed" them. However, her proclaimed "need" was deceptively false. Her billing records establish that even after the Supreme Court suspended the rules and permitted her the opportunity to supplement the Rule 32 Petition, she never once reviewed any portion of the record. RA 3rd 6. Accordingly, no one, neither the Petitioner, nor Levitt, reviewed any portion of the record for purposes of identifying issues for the supplemental Rule 32 Petition.

Consistent with her "abandonment" of Petitioner as a client, the billing records also show that after the Supreme Court directed that she give consideration to

supplementation of the Rule 32 Petition, Levitt conducted no independent investigation of potential issues, and she spent the grand total of one hour evaluating a sole issue, prior to preparing a Supplemental Petition. As noted above, when Levitt moved to withdraw as counsel, she had informed the court that she had no attorney-client relationship with the Petitioner. Subsequently, Levitt revealed by her conduct that she intended to perform no services of substance for the Petitioner and no services of any substance were performed. Her billing records confirm a grand total of two hours in preparation of a Rule 32 Supplemental Petition. However, a significant portion of that Petition is consumed with additional prosecutorial arguments that Levitt asserted in opposition to certain issues that Petitioner had suggested to Levitt, in what he thought were privileged attorney-client communications.

In the Supplemental Rule 32 Petition, Levitt presented as an issue that trial counsel was ineffective for failing to adequately present evidence of Petitioner's mental incapacity at his death sentencing. As noted, this issue has substantial merit and constitutes one of the Petitioner's primary claims for relief in these proceedings. However, Levitt had already argued that this issue was *completely meritless* in her Petition for Review in the Supreme Court. (Compare RA 2nd 31 at p. 12 claim L, to RA 2nd 36 at p. 12 to RA 3rd 1 at p. 4.)

Levitt intentionally refused to investigate the subject ineffective assistance claim, and consistent with her abandonment of Petitioner as a client, she conducted no investigation of evidence of prejudice. Consequently, no evidence of prejudice was presented in the Supplemental Rule 32 Petition to support the claim of ineffective

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assistance of counsel.[11] Levitt's intentional refusal to investigate this claim (which, in the Supplemental Petition, she finally conceded had merit)[12] constituted positive misconduct prejudicial to both the Petitioner and the administration of justice. Following Levitt's submission of the Supplemental Rule 32 Petition, all requested relief was denied by the trial court and the Arizona Supreme Court denied further review. RA 3rd, and 40. While the action was still pending, Petitioner made a final request to the Arizona Supreme Court. Petitioner wrote the Arizona Supreme Court informing the court he had not received representation from Leavitt. Once again, Petitioner was ignored. The Supplemental Rule 32 Petition was denied, a warrant for the Petitioner's execution was issued and these habeas proceedings followed. RA 3rd 40.

During the course of her appointment, Levitt continually breached the duty of loyalty; "perhaps the most basic of counsel's duties." *Cuyler v. Sulivan,* 446 U.S. 335, 345 (1980). Ms. Leavitt breached her ethical duties, and hindered the formation of any attorney- client relationship, when she refused to personally meet with the Petitioner and when she refused to conduct a client interview to discover the facts of the case. Levitt breached her ethical duties, and acted outside the agency relationship, when, against the known wishes of the Petitioner, she "intentionally" forwent investigation of claims that she ultimately acknowledged had merit, including the ineffective assistance

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[11]Based on this alleged inadequacy in the evidence, the trial court dismissed the Supplemental Rule 32 Petition. *See pp. 3-4 above.* As explained at p. 5, under Arizona law the trial court should have granted a hearing that was requested for the presentation of such evidence, and its failure to do so renders its dismissal of the Supplemental Rule 32 Petition erroneous, and accordingly, Levitt's initial failure to present evidence was not a default of the claim. However, if this court finds there was a default, such default is excused for cause, for the reasons noted herein.

[12]As noted, again without **any** research or **any** investigation, in her prosecutorial role, Levitt initially opposed this claim as "meritless," in the Arizona Supreme Court Petition for Review. She never explained in her later pleadings why she had changed her mind about the issue; and the Arizona Supreme Court was left with both her arguments; one labeling the issue meritless and the other claiming the issue had merit.

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of counsel claim now at issue in these proceedings. Levitt breached her ethical duties, when she assumed an adversarial role in the Rule 32 proceedings, by playing an active prosecutorial role therein, to assure that admittedly meritorious claims were defeated. Levitt breached her ethical duties, and furthered her adversarial role in the proceedings, by repeatedly rejecting Petitioner's requests for access to the state court record so that he could assist in the discovery of meritorious claims; because she claimed that she needed to review the same, when her billing records demonstrate she never consulted the record. And, at critical junctures in the proceedings, Levitt breached her ethical duties when, ignoring a evident conflict of interest, she placed her personal interests ahead of the Petitioner's, and instead of investigating and presenting meritable claims, she presented repeated arguments in favor of her limited and ineffective advocacy. The prosecuting and judicial authorities had notice of substantially all of the above facts, and notwithstanding repeated requests from the Petitioner, the state authorities insisted that Petitioner receive services from a lawyer with whom Petitioner had no attorney-client relationship and with whom he had an irreconcilable conflict of interest.

The facts of this case illustrate a most extreme case of a lawyer acting outside the agency of the attorney-client relationship. There was no attorney-client relationship. The lawyer's conduct not only prejudiced the Petitioner, but was ultimately prejudicial to the administration of justice in the proceedings where his life was at stake. Regrettably, the malfeasance occurred at the insistence of the official state prosecutorial and judicial authorities, who knew of the potential negative effects of the malfeasance upon the ability of the Petitioner to seek enforcement of the his federal constitutional rights in these proceedings. Hence, whether or not Petitioner had a constitutional "right to counsel" – and even assuming he did not – facts (as here) which demonstrate a "constructive denial of counsel," [*Geders v. United States, supra; Lackin*

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v. Stine, supra.] also are sufficient to demonstrate a lack of "agency" for purpose of procedural default analysis. The facts in this case demonstrate in a compelling fashion that the Petitioner was faced with external impediments which made compliance with state procedural rules not only impracticable, but impossible, and accordingly there is cause for any default in the presentation of the subject ineffective assistance of counsel claim. *Murray v. Carrier, supra.*[13]

With respect to the factual basis underlying the cause issue, Petitioner submits that the material facts are undisputed and that no evidentiary hearing is needed to further demonstrate cause. However, if the court finds any of the facts, or the material inferences therefrom disputed, then the court must conduct an evidentiary hearing to

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[13]The above adequately demonstrate "cause" for any default associated with this claim (as well as other claims as incorporated below). In addition to the above argument, Petitioner also submits his constitutional rights were violated in the Rule 32 proceeding, and this constitutes a separate but equal showing of "cause." Whether or not a state court is constitutionally required to provide a post-conviction means for challenging the constitutionality of a conviction or sentence, if it chooses to do so, the Due Process Clause requires that the chosen means be minimally full and fair. *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993) (recognizing that in certain cases, appointment of counsel may be necessary to prevent due process violations in post-conviction cases. *Liebman* at section 7.1(b) p. 280-292. This is particularly so here, where the post-conviction proceeding is the first place a defendant can present a challenge to a conviction or sentence obtained in violation of the Sixth Amendment right to effective counsel. Further, although the United States Supreme Court has suggested the absence of post-conviction rights to counsel in *dicta*, Petitioner submits that the (i) procedural due process component of the Due Process Clause: (ii) the "meaningful access" component of the Due Process Clause; (iii) the Suspension Clause; (iv) the Equal Protection Clause; and (v) Eighth Amendment all require that counsel be provided in state "capital"post-conviction cases, when that post-conviction proceeding is the first place that a defendant can present a challenge to the denial of his constitutional right to effective assistance of counsel. See, *Liebman*, at section 7.2(a) p.292-320. In this case, the state authorities (which includes the "state appointed" defense counsel) working in concert, denied the Petitioner, an indigent, any "meaningful ability" to utilize state post-conviction procedures to test the legality of his conviction and sentence. Denial to the Petitioner of these above listed categories of constitutional rights at his post-conviction proceedings, further demonstrates "cause" for any alleged default in the presentation of his federal claims. Under the facts of this case, it would violate the Due Process Clause as well as the Suspension Clause, to find that Petitioner has failed to exhaust or has defaulted his claims. *Bonin v. Vasquez, supra; Liebman*, at section 26.3(b) p. 1100-01 n.36.

assess the sufficiency of the evidence. *Buffalo v. Sunn,* 854 F.2d 1158, 1165-66 (9th Cir. 1988) (when underlying facts concerning cause, such as the existence of an external impediment are in dispute, a district court should conduct an evidentiary hearing.) In order to excuse any default, the Petitioner must also establish prejudice. *Murray v. Carrier, supra.* The issue of prejudice is addressed next.

Prejudice

Petitioner was prejudiced by the ineffectiveness of his attorneys during the penalty phase of the proceedings. Petitioner furnished a confession implicating himself and the Co-Defendant in the deaths of the children. The only real issue in the case from the outset was with respect to the Petitioner's mental state at the time of the offense. Petitioner's trial counsel failed to adequately prepare or investigate Petitioner's mental state defense and this deficiency in the representation resulted in a failure to present compelling mitigating evidence at the penalty phase of a capital case. The failure to present mitigating evidence constitutes ineffective assistance of counsel. As demonstrated below, the error caused prejudice, sufficient to undermine confidence of the outcome of the sentencing process, mandating that the requested habeas relief be granted in these proceedings.

Prior to trial, counsel undertook a very limited investigation into Petitioner's mental health and mental state during the time of the offense. Counsel questioned Petitioner's competency to stand trial and he requested that Petitioner's competency and mental state at the time of the offense be examined in proceedings under Rule 11, Arizona Rules of Criminal Procedure. In making the request for the examination, counsel noted that Petitioner had suffered from numerous head injuries, and he had a long history of psychological disorders which resulted in at least two prior in-patient psychiatric hospitalizations. RA 48, 60.

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

RICHARD DALE STOKLEY, Petitioner, vs. TERRY L. STEWART, et al. Respondents.	NO. CIV 98-332-TUC-FRZ **SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner, Richard Dale Stokley, by and through undersigned counsel hereby submits his Second Amended Petition for Writ of habeas Corpus.

DATED this 21st day of June, 1999.

WATERFALL, ECONOMIDIS, CALDWELL,
HANSHAW & VILLAMANA, P.C.

By _____
Cary Sandman
James W. Stuehringer
Attorneys for Petitioner

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B. The State Courts Violated the Petitioner's Eighth and Fourteenth Amendment Rights When They Failed to Consider or Give Effect to Mitigation Evidence That Petitioner Established by a Preponderance of Evidence.

85. The Constitution requires states to consider and give effect to mitigation evidence in capital cases. Failure to consider or to give effect to all mitigating evidence is arbitrary and risks erroneous imposition of a death sentence, in plain violation of the Eighth and Fourteenth Amendments. *Locket v. Ohio*, 438 U.S. 586 (1978). The record demonstrates that the State trial and appellate court engaged in a sentencing process that accorded no significance to the character and record of the offender; in blatant violation of United States Supreme Court precedent.

1. Factual Summary of Mitigation.

86. During the sentencing proceedings in the trial court the Petitioner presented mitigation evidence summarized as follows:

(a) Petitioner's Character.

87. Numerous witnesses offered testimony relevant to facets of the Petitioner's character. These witnesses offered testimony that Petitioner, ". . . was always so tenderhearted"; that "if someone had a need, [Petitioner] wanted to help you"; that ". . . he was nice to children"; that "[Petitioner] was not a violent person"; that "Petitioner was a good person"; that "I didn't think [Petitioner] could hurt someone"; that "I thought he was honest"; that "regardless of the charged offenses, I just could not believe [it]"; that "everybody knew him and loved him"; that "I can't believe that [Petitioner] has been convicted of two murders and sexual assaults of young girls because he was never that kind of guy; that I still don't believe he done it because I've known Richard too long and he's just not that kind of person"; and that "[Petitioner was not that way . . . I just couldn't believe he would be able to do anything like that." Deposition of Zelma Brause, June 1, 1992 at pp. 14-15; Deposition of Patricia Donahue, June 1, 1992 at pp. 6-12; Deposition of Walter Donahue dated June 1, 1992 at pp. 7, 10, 20; Deposition of Rosemary Maxwell June 1, 1992 at pp. 6-11; Deposition

of Ida Mae Parrish dated June 1, 1992 at pp. 4-8; Deposition of Robert Parrish dated June 1, 1992 at pp. 7; Deposition of Barbara Thompson June 1, 1992 at p. 20. R.T. June 16, 1992 at p. 108. This evidence concerning the Petitioner's character was accorded **no** mitigating weight by State courts when they imposed and reviewed Petitioner's sentence.

(b) Family History.

88. Concerning Petitioner's family history and the history of chaos, abuse and neglect during his upbringing, the Petitioner presented documentation from psychiatric hospitalization reports that pre-dated the subject offense by decades. These records make reference to facts elicited 20 years prior to the offense, when Petitioner was only 18 years old, and report findings of a history of an unstable childhood" a resulting, intense feelings of anger, several suicide attempts," as well as "a history of chronic drug abuse including LSD, marijuana, angel dust, speed and alcohol." (As noted above in paragraphs 70(b)(c) this symptomology, including the excessive substance abuse, were a product of the Petitioner's BPD disorder, which in turn were a by-product of the chaotic environment in which Petitioner was raised.)

89. Witnesses, independent of the Petitioner, furnished evidence to the trial court with respect to the Petitioner's unstable childhood environment. They testified that Petitioner was shifted back and forth between his mother, grandmother and other family members; "particularly when his mother did not want him." Deposition of Zelma Brause, June 1, 1992 at pp. 5-8; Deposition of Barbara Thompson June 1, 1992 at pp. 6-10; 15-16. When Petitioner's mother became pregnant she told her sister-in-law, Mabel Gentry, that she did not want the baby if it was a boy; and the mother gave Mabel the Petitioner when he was three months old. R.T. June 16, 1992 at pp. 80-83. Petitioner was shifted back and forth between relatives until age two when his mother married and he lived with his mother and step-father. Witnesses testified that Petitioner never knew his biological father and his step-father did not love him. R.T. June 16, 1992 at pp. 88-89; Deposition of Barbara Thompson

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June 1, 1992 at pp. 10, 15-16. Petitioner's mother divorced his step-father when he was approximately ten, whereafter he again was sallied off among different members of the family. Referencing Petitioner's Uncle Homer, who Petitioner lived with periodically, a witness testified, ". . . he is difficult, . . . I can't really tell you because it [would] really make a mess . . . I'd like to tell you though . . . he was very strict. Zelma Brause deposition at pp. 8-9. Petitioner related beatings by his step-father and grandmother. Regarding whippings by the grandmother, one witness testified, ". . . my mother used the switch more than my daddy and she didn't put it away when she got [Petitioner]." *Id.* at p. 21.

90. Psychological testimony presented during the sentencing hearings were unequivocal that the Petitioner's chaotic upbringing caused him to experience significant dysfunction in his adult life. R.T. June 18, 1992 at pp. 14-15; SE # at p. 6. Dr. Morris reported that Petitioner's early childhood experiences led to the creation of psychological disorders, including BPD; and that as a result of these disorders Petitioner exhibits problems with cognition, controlling emotions, anger and impulsivity. R.T. June 18, at pp. 25-31.

91. This non-rebutted evidence concerning the Petitioner's troubled and disturbing childhood and its related cause of Petitioner's psychological disturbances was accorded no mitigating weight in the sentencing proceedings or during the appellate review thereof.

(c) Mental and Organic Impairments.

92. Concerning mental disabilities and Petitioner's significantly diminished capacity at the time of the offense, the Petitioner presented testimony from a psychologist, Dr. Morris, who testified that Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as a result of a combination of diagnosed psychological disorders; alcohol intoxication and the associated inability to control impulsive behavior. He explained how a BPD reflective anger episode, like one that affected Petitioner at the time of the offense, is *extremely* hard to control. R.T. June

18, 1992 at pp. 48-49; 65-66.[13]

93. Petitioner also presented the testimony of a neurologist, Dr. Mayron, who testified that Petitioner had sustained "very, very severe injury to the left side of his brain" which caused permanent damage, as evidenced during a physical neurological examination. He testified that this injury (i) would impair Petitioner's behavior and cognitive ability; (ii) that Petitioner's brain was moderately to severely impaired; (iii) that such injuries (independent of Petitioner's pre-existing psychological disorders) would affect anger and emotional control, would result in behavior that was often impulsive, and that the ability to plan ahead and reflect would be severely impaired.

94. Dr. Mayron stressed that Petitioner's brain damage would increase the severity of the symptomology of Petitioner's pre-existing Borderline Personality Disorder (BPD) ; he testified that the BPD (and resulting loss of control) would be blown way out of proportion to what it would be absent the brain damage. TR. June 17, 1992 at pp. 11-12; 15-39.[14]

95. Notwithstanding that Petitioner established that his participation in the offense was the proximate result of his mental and organic deficiencies, and even though the state presented no evidence to rebut the above medical evidence, the trial court afforded no weight to any of this mitigating evidence.

(d) Other Mitigation Evidence.

96. In addition to the above evidence, the Petitioner presented mitigation testimony from the chief police investigating officer of the subject offense, who corroborated Petitioner's confession and full cooperation with the law enforcement investigation soon after his arrest.

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[13]As discussed above, due to counsel's ineffectiveness, the psychologist did not have information concerning the extent and effect of Petitioner's organic brain damage; which would have established the full extent of the affected diminished capacity.

[14]Due to the ineffectiveness of sentencing counsel, Dr. Mayron did not have the results of neuropsychcological testing; which would have permitted him to testify as to the particulars of the Petitioner's brain damage, its specific affect on his cognition and behavior and its causal relationship to the offense. *Id.* at pp. 64-66.

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R.T. June 18, 1992 at pp. 163-69. He also presented testimony from the Deputy Commander of the Cochise County Jail concerning Petitioner's respectful and cooperative behavior during nine months of incarceration. Id, at pp. 152-55. He presented evidence of lack of any prior felony record. *Id*, at p. 156-57.

97. Petitioner presented reliable expert testimony (which was not rebutted by the state) that Petitioner was capable of rehabilitation, and once removed from the influence of alcohol, as he would be in prison, that Petitioner would not present himself as a danger to others. This evidence was presented by John J. Sloss, who is a former long time member of the Arizona Board of Pardon and Parole and a former Assistant Superintendent of an Arizona Department of Corrections facility. R.T. June 17, 1992 at pp. 74-81; 96-111. Dr. Morris corroborated Mr. Sloss, testifying that an individual with Petitioner's disorders would be a good candidate for behaving as a model prisoner, once removed from ordinary society and placed in a highly structured environment that prison would provide. R.T. June 18, 1992 at pp. 56-57, 64-65. To date, Mr. Sloss' predictions have proven correct. Petitioner has made an appropriate adjustment of his behavior to that required of him by the Department of Corrections.

98. None of the above evidence was accorded any mitigating weight by the sentencing court.

2. The Trial Court's Failure to Give Consideration and Effect to Mitigating Circumstances Violated the Eighth and Fourteenth Amendments.

99. It is evident from a review of the trial court's sentencing decision, that the court believed that it could not consider or give effect to any mitigating circumstance that was not directly related to Petitioner's culpability for the subject offense.[15] Here, the sentencing court

[15]The trial court (and later the Arizona Supreme Court during its review) "accorded no significance to facets of the character of the individual offender" and it "treat[ed] [Petitioner] convicted of a designated offense, not as [a] uniquely individual human being, but as [a] member of a faceless undifferentiated mass to be subjected to the blind infliction of the penalty of death," in violation of the Eighth Amendment. *Woodson v. North Carolina*, 428 U.S. at 304 (plurality).

committed Eighth Amendment constitutional error. Relevant mitigating evidence, even if not related specifically to Petitioner's culpability, must be considered and given effect. *Skipper v. North Carolina,* 476 U.S. 1, 4-5 (1986). As a result of this error, the sentencing decision was contrary to clearly established Federal law as determined by the Supreme Court of the United States, thereby entitling the Petitioner to grant of the writ pursuant to 28 U.S.C. § 2254(d)(1).

100. Examples of the sentencing court's errors are reflected in its written decision. RA 231. With respect to the evidence of the Petitioner's mental disabilities and organic brain disorder, the court dismissed the evidence stating "they are not mitigating factors," and "they shed little light on the defendant's conduct in this case." RA 231 at p. 10-11. The trial court was not permitted, consistent with the requirements of the Eighth Amendment, to dismiss the evidence from its consideration as mitigation because it did not excuse the defendant's conduct. *Eddings v. Oklahoma,* 476 U.S. at 113-116 (evidence of defendant's troubled childhood and emotional disturbance relevant to mitigation even if it did not excuse the defendant's conduct). *Skipper v. South Carolina, supra,* (evidence of good behavior in jail cannot be dismissed as irrelevant and thereby excluded from consideration just because it does not reduce Petitioner's culpability for offense).

101. The trial court committed an identical error in connection with the evidence presented concerning Petitioner's dysfunctional, and abusive upbringing, and the relationship that evidence had to the cause of his psychological impairments; which in turn directly influenced his involvement in the offense. Again, the court limited its consideration and the giving of mitigating effect only to evidence, that excused the conduct constituting the offense. The court held that there was "nothing especially impairing" arising from the evidence, i.e., nothing that excused the Petitioner's culpability for the offense. Here again, the trial court's "narrowing" of consideration of mitigating evidence to that which excused the conduct related to the offense, violated the Eighth Amendment. *Skipper, supra; Eddings, supra.*

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102. The trial court went on to reject and refuse to consider much of the remainder of the presented mitigation evidence as irrelevant, or in an otherwise wholly arbitrary fashion. With respect to the uncontradicted evidence that Petitioner had exhibited good behavior while incarcerated and Petitioner's lack of potential for future dangerousness the court found the evidence could not constitute mitigating circumstances. This evidence was mitigating. *Hitchcock v. Dugger,* 481 U.S. 393 (1987) (refusal to allow consideration of evidence that defendant is capable of rehabilitation violated Eighth Amendment). *Skipper v. South Carolina, supra.* (evidence of good behavior in jail cannot be dismissed as irrelevant and thereby excluded from consideration just because it does not reduce Petitioner's culpability for offense). While a sentencing court is free to give mitigation the weight it deems appropriate, it is not free to refuse to consider it or give it any effect. *Boyde v. California,* 494 U.S. 370 (1990); *Smith v. McCormick,* 914 F.2d 1153, 1165-66 (9th Cir. 1990) (Montana courts were entitled to conclude that the mitigating evidence was not persuasive enough to grant a sentence of less than death, but they were not entitled to refuse to consider it as mitigating).

103. Failure to consider mitigating evidence renders the death sentence invalid. *Hitchcock v. Dugger, supra.*

104. In connection with its decision (that Petitioner had failed to establish any mitigation by the preponderance of evidence) the trial court also engaged in "unreasonable determinations of the facts in light of the evidence presented"; or, even if its determination was reasonable, its findings were not fairly supported by the record. See, 28 U.S.C. § 22541(d)(2) and (e). Such findings are not binding on this Court. "To find that mitigating circumstances do not exist where such mitigating circumstances clearly exist returns us to the state of affairs which were found by the Supreme Court to be prohibited by the Constitution in *Furman v. Georgia*." *Magwood v. Smith*, 791 F.2d 1438, 1448 (11th Cir. 1986) (erroneous finding of lack of mitigation not entitled to presumption of correctness). The Court

should grant an evidentiary hearing to enable petitioner to demonstrate the errors in any fact finding.

3. The Trial Court's Failure to Accord any Mitigating Weight to the Co-Defendant's Guilty Plea to Second Degree Murder and 20 Year Prison Sentence was Arbitrary.

105. Unexplained disparities in sentences as between co-defendants is evidence properly considered in mitigation of the ultimate penalty. *State v. Watson*, 129 Ariz. 60, 64, 628 P.2d 943, 947 (1981). Here, although (i) the co-defendant was the demonstrated instigator of the offense; (ii) the co-defendant (unlike Petitioner) was unburdened by an organic mental dysfunction; (iii) the co-defendant furnished an implausible and ridiculous denial of his complicity; and (iv) at the time of his plea, the state had an enormous catalog of evidence establishing the co-defendant's guilt – the co-defendant was given a reduced plea and a mere 20 year sentence. The organically impaired Petitioner, (i) who admitted to the offense; (ii) who was convicted of murdering one of the girls as the "accomplice" to the actual co-defendant murderer; and (iii) whose sentence is based in part upon the trial court's finding that Petitioner is responsible for the heinous and depraved actions of the co-defendant, is to be executed.

106. The sole reason given by the trial court for this disparity is that the state did not have DNA evidence at the time that Brazeal's case was set for trial, and "the results of the tests would not have been available until long past the speedy trial for Brazeal [and] [l]acking DNA evidence, the state elected to enter into a plea agreement." RA 231 at p 9. This explanation contains no support in the record. The record demonstrates that just one week prior to Brazeal's plea his lawyers requested a continuance of his trial and offered to waive speedy trial rights. There is no record supporting the trial court's statement, that Brazeal was offered a plea because he insisted on a speedy trial, and further, Brazeal had no right to insist on a trial before the DNA testing was completed. The state had a clear right to continue the trial for a reasonable time, until the DNA evidence was available. See, Rule 8.5, Arizona

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Rules of Criminal Procedure. The DNA evidence became available within a brief time after the Brazeal's case was completed.

107. The refusal to consider or give mitigating effect to the co-defendant's sentence was arbitrary; it was based upon an unreasonable determination of fact, or, the facts are not fairly supported by the record. The rejection of this mitigating circumstance was erroneous and denied the Petitioner's rights under the Eighth and Fourteenth Amendments, to have mitigation evidence considered and given effect. The Court should conduct an evidentiary hearing to determine the state court's faulty factual determination.

4. The Arizona Supreme Court Failed to Cure any of the Trial Court's Errors When it Independently Reviewed the Petitioner's Sentence.

108. None of the fundamental errors made by the trial court were corrected by the Arizona Supreme Court. Although that court found that some of the evidence of the Petitioner's mental state was of minimum mitigating value, it (i) adopted the erroneous findings of the trial court that Petitioner was not significantly impaired; (ii) it refused to consider any of the mitigating evidence related to Petitioner's troubled family background because it did not directly reduce Petitioner's culpability for the offense; (iii) it refused to consider Petitioner's good behavior in jail as mitigating; and (iv) it refused to consider Petitioner's cooperation with the police.[16] In short, the Arizona Supreme Court adopted the errors made in the trial court refusing to consider or give effect to the mitigating evidence. Petitioner's rights under the Eighth and Fourteenth Amendments were violated thereby.

109. In its decision upholding the Petitioner's sentence, the Arizona Supreme Court held **as a matter of law,** that good behavior during pre-trial incarceration cannot be considered or given effect as mitigation. *State v. Stokley, supra,* at 182 Ariz. 524, 898 P.2d

[16] In its independent review of the sentence, the Arizona Supreme Court neglected to correct the error, despite its own decisions where such "cooperation" mitigation was found. *State v. Lee,* 189 Ariz. 590,596, 944 P.2d 1204, 1210 (1997); *State v. Scott,* 177 Ariz. 131, 134, 144, 865 P.2d 792, 795, 805 (1993). Both the trial court and reviewing court arbitrarily rejected the Petitioner's evidence of cooperation.

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473. This aspect of its decision is directly contrary to United States Supreme Court precedent. In *Skipper v. North Carolina,* 476 U.S. 1 (1986) the court overturned Skipper's death sentence because the South Carolina courts held that good behavior during pre-trial incarceration would not be considered as a matter of law. The Supreme Court overturned the sentence noting, although it is true that Skipper's good behavior during pre-trial incarceration did not relate to his culpability for the offense, there is no question that inferences from such evidence are mitigating and must be considered and given effect in determining the sentence. Arizona's preclusion of such mitigation evidence "by law" violates the ruling in *Skipper* and the Eighth and Fourteenth Amendments.

110. In its decision upholding the Petitioner's sentence, the Arizona Supreme Court also held **as a matter of law** that evidence of a difficult or abusive family background cannot be considered or given effect as mitigation, unless the Defendant can prove (in addition to the evidence of the Defendant's unhappy upbringing) precisely how such difficult childhood lessened culpability for the offense. The Arizona Supreme Court cited state precedent for this legal ruling which pre-dated the Petitioner's sentence, and would have been an incorrect guidepost to the trial court when it imposed the sentence. *State v. Stokley,* 182 Ariz. 524, 898 P.2d 473. This aspect of the court's sentencing decision in Petitioner's case is directly contrary to United States Supreme Court precedent.

111. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982) the court overturned Eddings' death sentence, because the Oklahoma courts had (just like Arizona has done here) refused to consider Eddings' "troubled family" evidence because it did not directly explain or reduce his culpability for the offense. In *Eddings,* the Supreme Court held that legal limitations imposed on the consideration of mitigation evidence, particularly a troubled family background of the accused, must be considered and given effect. Such evidence cannot be refused consideration as a matter of law, as it is in Arizona courts, and given consideration only if it tends to support an excuse from criminal liability. As the court noted in *Eddings*, "the

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sentencer and the Court of Appeals on Review may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding it from their consideration." *Id.*, at 455 U.S. 114. Arizona's preclusion by law, of mitigation evidence concerning Petitioner's troubled upbringing, violates the Eighth and Fourteenth Amendments.

112. Here, even under the Arizona Supreme Court's unconstitutional standard, the Petitioner did present evidence that his troubled family background did influence his behavior and reduce his culpability at the time of the offense. He presented unrebutted testimony linking his behavior at the time of the offense to mental impairments that had their roots in his chaotic upbringing. See paragraphs 70(c)(d) and 88-91 above. The Arizona Supreme Court's decision (that Petitioner failed to present mitigation that his upbringing affected his behavior at the time of the offense) is based upon an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) and is entitled to no weight in this Court. The Petitioner's sentence (which results from the failure to consider this evidence) violates the Eighth and Fourteenth Amendments.

113. In its decision upholding the Petitioner's sentence, the Arizona Supreme Court refused to consider or give any effect to evidence of Petitioner's prospects for rehabilitation; finding that "[Petitioner] *showed no evidence of ability to rehabilitate.*" *Id.*, at 182 Ariz 524, 898 P.2d 473. The Petitioner did present unrebutted credible evidence of an ability to successfully rehabilitate. See paragraph 97 above.

114. The Arizona Supreme Court was free to accord whatever weight it deemed proper to such rehabilitation evidence, and it was free to consider and make findings as to whether the Petitioner established the evidence by a preponderance of evidence, but that court was not entitled to find that **no** evidence was presented, when in fact abundant evidence was presented to it in the record. *Magwood v. Smith, supra.*

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115. The Arizona Supreme Court's decision (that Petitioner presented no evidence of an ability to rehabilitate) is based upon an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) and is entitled to no weight in this Court. The Petitioner's sentence (which results from the failure to consider this evidence) violates the Eighth and Fourteenth Amendments.

116. In its decision upholding the Petitioner's sentence, and in considering the mitigating weight to be accorded the evidence of Petitioner's mental and organic impairments, the Arizona Supreme Court arbitrarily determined that defendant's with Borderline Personality Disorder (BPD) is not considered a mental disease or psychological disorder, and that BPD is not generally sufficient to establish a significant mental impairment for mitigation purposes of sentencing. This legal ruling is yet another funnel through which the Arizona courts limit and narrow the sentencer's discretion to consider relevant evidence that might cause it to decline to impose a death sentence.

117. The testimony at the Petitioner's trial, which was not rebutted, is that BPD can be acutely disabling, especially in combination with organic brain dysfunction as in Petitioner's case, and that it is not a mere personality disorder. It is a psychological disorder. See paragraphs 70 and 92-95 above.

118. The Arizona Supreme Court's arbitrary narrowing of the evidence it will consider as evidence of a mental impairment resulted in an reasonable determination of the facts under 28 U.S.C. § 2254(d)(2). As a further result it denied the Petitioner the right to have relevant mitigation evidence of his disabling mental impairments given consideration and effect, in violation of the Petitioner's Eighth and Fourteenth Amendment rights. "The Constitution limits a state's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." *McCoy v. North Carolina,* 494 U.S. 433, 443 (1990).

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119. The Arizona Supreme Court's imposition of legal standards and rules directed to impede and prevent the consideration of relevant mitigation evidence (to-wit: (i) its direction that sentencing courts not consider good behavior during pre-trial incarceration; (ii) its direction that sentencing courts not consider evidence of a defendant's troubled family background, unless the defendant can prove it directly lessened culpability for the underlying offense; (iii) its arbitrary limitation and related direction to sentencing courts to greatly limit the mitigating weight to be accorded certain mental impairments such as BPD, despite evidence that BPD is a severe psychologically disabling disorder) all collectively demonstrate a concerted action to establish standards that narrow the sentencer's discretion to consider relevant evidence that might cause it to decline to impose a death sentence, in violation of the Petitioner's Eighth and Fourteenth Amendment rights.

120. In its review of the sentence, the Arizona Supreme Court adopted the erroneous and arbitrary reasoning of the trial court, and failed to consider the co-defendant's sentence in mitigation of the Petitioner's sentence. For the reasons alleged in paragraphs 105 to 107 where this error also resulted in violation of the Petitioner's Eighth and Fourteenth Amendment rights.

5. The Petitioner is Entitled to an Evidentiary Hearing.

121. Petitioner is entitled to a evidentiary hearing where the factual errors and prejudicial effects of the above errors, resulting from the state court's refusal to consider or give effect to mitigate evidence, can be demonstrated.

C. Petitioner's Death Sentence Was Arbitrary in Violation of the Eighth and Fourteenth Amendments Under Circumstances Where the Equally Culpable or More Culpable Co-Defendant was Spared and There is No Rational Basis that Justifies Infliction of the Death Penalty on Him Alone.

122. Within the state proceedings, the Petitioner objected to his sentence on the basis that in light of the co-defendant's sentence, it was arbitrary in violation of the Eighth and Fourteenth Amendments. RA 207 at p.8-10. "If the State has determined that death should

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CLERK OF SUPERIOR COURT
BY _____ DEPUTY

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Bar Number 7077

Attorney for

Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff, vs. RICHARD DALE STOKLEY, Defendant.	NO. CR-9100284A ~~REQUEST FOR HEARING~~/ REQUEST FOR RULING (Judge Borowiec)

COMES NOW, the Defendant, by and through his attorney undersigned, and pursuant to Rule 32.8, Arizona Rules of Criminal Procedure, requests that a hearing be set on his Petition for Post-Conviction Relief within the time limits set forth in the Rule. The State has filed its opposition and Defendant has filed a reply.

In the alternative, Defendant requests this court issue its ruling. The court has twenty days in which to issue a ruling, pursuant to A.R.S. §13-4236.

RESPECTFULLY SUBMITTED this 29th day of January, 1998.

HARRIETTE P. LEVITT
Attorney for Defendant Stokley

1/29/98

Copy of the foregoing mailed
this 29th day of January, 1998, to:

The Honorable Judge Borowiec
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Attorney for
Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff, vs. RICHARD DALE STOKLEY, Defendant.	NO. CR91-00284A **MOTION FOR COMPENSATION OF APPOINTED COUNSEL** (Interim Billing) (Assigned to Judge Borowiec)

Counsel for Defendant moves this Court to order payment of reasonable fees and costs incurred in representing Defendant in his death penalty Rule 32 proceedings in the above-captioned matter. This Motion is based on the accompanying Affidavit.

RESPECTFULLY SUBMITTED this 2nd day of December, 1997.

HARRIETTE P. LEVITT
Attorney for Defendant

12/2/97
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff, vs. RICHARD DALE STOKLEY, Defendant.	NO. CR91-00284A **AFFIDAVIT ACCOMPANYING MOTION FOR COMPENSATION OF APPOINTED COUNSEL** (Interim Billing) (Assigned to Judge Boroweic)

STATE OF ARIZONA)
)ss.
County of Pima)

HARRIETTE P. LEVITT, being first sworn says as follows: I was appointed on April 17, 1996 by the Superior Court, State of Arizona, to represent Defendant in his Rule 32 Petition in the above-captioned matter. To date, the representation has involved the following:

05/01/97	Review minute entry from court	.3
05/01/97	Telephone call to Carla Ryan's office	.2
05/02/97	Telephone call to Eric Olsson, Assistant Attorney General	.2
05/02/97	Review motion filed by Carla Ryan	1.2
05/02/07	Review pleadings	2.0

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05/01/97	Draft petition for review	2.8
05/02/97	Second telephone call to Eric Olsson	.2
05/05/97	Telephone call to Carla Ryan	.2
05/05/97	Revise petition for review	1.0
05/05/97	Final petition for review	.3
06/10/97	Dictate letter to client	.2
06/27/97	Review Supreme Court order	.2
06/30/97	Dictate letter to client	.2
07/07/97	Review letter from client (4 pages, single-spaced) setting forth his issues	.5
07/15/97	Dictate motion to extend Rule 32 deadline	.2
07/18/97	Dictate letter to client	.3
07/22/97	Dictate letter to client	.2
07/29/97	Review Supreme Court order	.2
08/07/97	Review letter from client raising additional issues, dictate detailed response	1.0
08/10/97	Review lengthy letter from client readdressing issues he wants raised in his Rule 32 petition	.4
10/09/97	Research diminished capacity defenses	1.0
10/09/97	Dictate supplemental Rule 32 petition	1.0
10/10/97	Final supplemental Rule 32 petition	1.0
11/03/97	Telephone Conference with Eric Olsson	.2
11/05/97	Review State's motion to extension of time	.2
11/12/97	Dictate reply to State's motion for extension of time	.2
	TOTAL HOURS	15.40

TOTAL FEES @ $45/Hr.	$693.00
COSTS: Photocopy charges	25.80
Postage	5.34
TOTAL COSTS	31.14
GRAND TOTAL OF FEES AND COSTS	$724.14

RESPECTFULLY SUBMITTED this 2nd day of December, 1997.

HARRIETTE P. LEVITT
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 2nd day of December, 1997, by HARRIETTE P. LEVITT, Attorney for Defendant.

Notary Public

My Commission Expires:
June 19, 2001

OFFICIAL SEAL
MARY A. PURTELL
NOTARY PUBLIC - ARIZONA
PIMA COUNTY
My Comm. Expires June 19, 2001

#96-1429

(SP... BELOW FOR FILING STAMP ONLY)

OCT 10 '97

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FILED
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...CLERK
...COURT
BY...

Attorney for Bar Number 7077

Defendant/Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff/Respondent, vs. RICHARD DALE STOKLEY, Defendant/Petitioner.	NO. CR-9100284A **SUPPLEMENTAL PETITION FOR POST-CONVICTION RELIEF** (Assigned to Judge Borowiec)

COMES NOW, the Petitioner, by and through his attorney undersigned, and pursuant to Rule 32, Arizona Rules of Criminal Procedure, submits his Supplemental Rule 32 Petition. This petition is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 10th day of October, 1997.

HARRIETTE P. LEVITT
Attorney for Petitioner

10/10/97

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Supreme Court order dated June 27, 1997, Petitioner hereby supplements his Rule 32 petition filed on January 8, 1997.

A. Defense Counsel Was Ineffective For Failing To Preserve the Record on His Objection To The Admission of Gruesome Photographs.

Defense counsel moved in limine to preclude the admission of autopsy photographs. The court denied the motion. Five autopsy photographs of the victims were admitted into evidence at trial and submitted to the jury. Defense counsel failed to object to the admission of the individual photographs at the time of trial, thereby failing to preserve the record.

An issue pertaining to the admission of the autopsy photographs was raised on appeal. In its ruling, the Supreme Court stated that absent fundamental error, the admission of the exhibits could not be raised on appeal if no objections were made at trial. The court then found that even if inflammatory, the probative value of the photographs outweighed any prejudicial effect.

Defense counsel was ineffective for failing to preserve the record on appeal, thereby precluding appellate counsel from properly arguing this issue on appeal. In addition, defense counsel was ineffective for failing to properly argue this issue at the trial court level.

The trial court has discretion to decide whether to admit photographs. Its decision will not be disturbed absent a clear

abuse of discretion. State v. Bailey, 160 Ariz. 277 772 P.2d 1130 (1989); State v. Amaya-Ruiz, 166 Ariz. 152 800 P.2d 1260 cert.denied 111 S.Ct. 2044, 114 L.E.D.2d 129 (1990). The trial court must conduct a two-part inquiry to determine the admissability of photographs. First, the photographs must be relevant. Photographic evidence is relevant if it aids the jury in understanding any issue in dispute. State v. Amaya-Ruiz, supra. Second, the court must inquire into whether the photographs would tend to incite passion or inflame the jury. Rule 403, Arizona Rules of Evidence, provides that even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In the event the photographs are inflammatory, the court is required to balance their probative value against their potential to cause unfair prejudice. State v. Bailey, supra; State v. Amaya-Ruiz, supra.

The court found that the photographs at issue, Exhibits 36 through 40, were probative because they explained how the crimes were committed. There was, however, no argument as to how the crimes were committed. There was ample additional evidence before the jury explaining the manner in which the crimes were committed such as Petitioner's sworn statement to the Benson Arizona Police Department detailing the crimes. In addition, the forensic pathologist testified as to the manner of the victims' deaths and the extent of their wounds. "[P]hotographs would generally be inappropriate where the only

relevant evidence they convey can be put before the jury readily and accurately by other means not accompanied by the potential prejudice." State v. Cloud, 722 P.2d 750, 752 (Utah 1986); State v. Lord, 822 P.2d 177 (Wash), cert.denied 113 S.Ct. 164 (1992); Gross v. Black-N-Decker, Inc., 695 F.2d 858, 863 (5th cir. 1983); State v. Martinez, 607 P.2d 137, 139 (N.M. App. 1980).

It is submitted that the photographs were merely cumulative and constituted evidence of uncontested issues. The sole purpose in admitting the photographs was to inflame the passions of the jury. As such, they should have been ruled inadmissible.

The crimes in the instant case were appalling, especially in a small community where the victims and their families were known to a number of residents of the community. The residents were extremely hostile towards Petitioner. The admission of the five photographs of the young victims depicting stomp marks and bruises on the thirteen-year-old girls was extremely prejudicial in the face of the hostile community.

An evidentiary hearing is warranted to determine whether defense counsel's failure to preserve this issue for appeal was a strategic decision or whether he fell below the minimum standards for competency set forth by the Arizona courts.

B. Trial Counsel Was Ineffective In Failing To Properly Argue Petitioner's Mental Incapacity As A Mitigating Factor At The Time Of Sentencing.

If a preliminary showing is made that sanity at the time of

the offense is likely to be a significant factor at trial, the federal constitution requires the state to provide access to a psychiatrist's assistance if the defendant cannot afford it, Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985). In the case at bar, evaluations were conducted pursuant to Rule 11, Arizona Rules of Criminal Procedure. Petitioner found that he was competent to stand trial. Insanity was not a defense at trial.

In a capital case, the defendant also enjoys a corresponding constitutional protection at the sentencing phase. Ake v. Oklahoma, supra at 82-84, 105 S.Ct. at 1096; Smith v. McCormick, 914 F.2d 1153 (9th cir. 1990). In Arizona, this right is codified at A.R.S. Section 13-4013(B), which specifically provides:

> "When a person is charged with a capital offense the court may on its own initiative and shall upon application of the defendant and a showing that the defendant is financially unable to pay for such services, appoint such investigators and expert witnesses as are reasonably necessary adequately to present his defense at trial and at any subsequent proceeding. Compensation for such investigators and expert witnesses shall be such amount as the court, in its discretion, deems reasonable and shall be paid by the county." (emphasis added) State v. Eastlack, 180 Ariz. 243, 883 P.2d 999 (1994).

While the issue in State v. Eastlack, supra., is distinguishable from the case at bar, it is still instructive. In State v. Eastlack, supra., the Arizona Supreme Court found that an indigent defendant in a capital case has an absolute right to the help of expert witnesses at the sentencing stage.

In the case at bar, due to defense counsel's incompetence, Petitioner was denied the right to present potentially viable mitigating evidence at the sentencing phase.

Once death eligible, there is a strong possibility of a death sentence unless defense counsel produces mitigating evidence sufficient to call for leniency. The most likely source of such mitigation lies in defendant's psychological and mental makeup and his behavioral background.

There were numerous "red flags" concerning Petitioner's psychological makeup. Petitioner has a history of multiple head injuries. A neurological evaluation was conducted on May 6, 1992. Doctor Mayron found, among other things, that one of the head injuries appeared to a permanent post-concussion syndrome memory impairment and disturbance characterized by increased difficulty with impulse control. Dr. Mayron found that this would have been worsened by the 1982 head injury that resulted in deficits to the right side of Petitioner's brain.

Dr. Larry A. Morris, a clinical psychologist, found that Petitioner did not appear to suffer from a psychotic disorder, but found that he had a history of depression and other serious psychological problems. Dr. Morris stated in his evaluation that a diagnosis of depression, polysubstance abuse, and borderline personality disorder should be considered.

A psychiatric evaluation was never conducted on Petitioner for mitigational purposes prior to sentencing. The evaluations were conducted for the sole purpose of determining Petitioner's

competency to stand trial. The evidence suggests that an psychiatrist should have been appointed to determine whether additional mitigating evidence was available.

An evidentiary hearing is warranted on this issue, at which time evidence will be presented in mitigation of Petitioner's sentence.

C. Additional Issues Petitioner Wishes To Raise.

1. Petitioner wishes to argue that "Mr. Greenwood" visited him at the jail "as a friend of the court" in an effort to coerce Petitioner into pleading not guilty because Petitioner was going to receive the death penalty anyway. Counsel cannot in good faith argue this issue because it is irrelevant.

2. Petitioner wishes to raise another claim pertaining to change of venue. This issue was raised on appeal and in Petitioner's original Rule 32 petition. It is, therefore, precluded. In addition, Petitioner has not pointed to any prejudice regarding defense attorney's non-objections on the issue.

3. Petitioner also wishes to argue that he was entitled to a change of judge. Again, counsel cannot in good faith argue this issue. Both Petitioner and his co-defendant filed motions for change of judge pursuant to Rule 10.2, Arizona Rules of Criminal Procedure. Both motions were granted. Petitioner was not entitled to an additional change of judge pursuant to Rule 10 without a showing of good cause. He has not

provided counsel with any evidence that cause existed, pursuant to Rule 10.1, for an additional change of judge.

4. Finally, Petitioner wishes to raise a claim that the confession tape was inaudible and that the transcript of the tape submitted to the jury was inaccurate. Counsel cannot in good faith argue this issue. The tape has been reviewed and compared with the transcript used at trial. While portions of the confession tape were inaudible, the pertinent portions of the tape pertaining to the confession itself were audible. The transcript accurately reflects the audible portions of the tape. The transcriber made some grammatical corrections to Petitioner's statement, but none which change the substance of his confession.

The issues raised in this section "C" are not arguable issues under Rule 32. For this reason, these issues are filed in compliance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1969) and Montgomery v. Sheldon, 183 Ariz. Adv. Rptr. 27 (2/7/95). This court is requested to search the entire record for error, A.R.S. Section 13-1715(B).

VERIFICATION

STATE OF ARIZONA)
) ss.
County of Pima)

HARRIETTE P. LEVITT, being first duly sworn upon her oath, deposes and says:

That she is the attorney for Petitioner in the above entitled and captioned matter;

That she has read the foregoing Supplemental Petition for Post-Conviction Relief and knows the contents thereof; that the information contained therein was provided to her by Petitioner; that the same are true and correct to the best of her knowledge, information and belief; and that pursuant to A.R.S. Section 13-4235, this Petition contains all known grounds for relief under Rule 32.

HARRIETTE P. LEVITT

SUBSCRIBED AND SWORN TO before me this 10th day of October, 1997, by HARRIETTE P. LEVITT, attorney for Petitioner herein.

Notary Public

OFFICIAL SEAL
MARY A. PURTELL
NOTARY PUBLIC - ARIZONA
PIMA COUNTY
My Comm. Expires June 19, 2001

My Commission expires:
June 19, 2001

Copy of the foregoing delivered this 10th day of October, 1997, to:

Eric J. Olsson, Esquire
Assistant Attorney General
400 W. Congress, Bldg. S-315
Tucson, Arizona 85701

And Mailed to:

Richard Stokley, #92408
Arizona State Prison
CB-6
P. O. Box 8600
Florence, Arizona 85232

JUN 12 RECD

IN THE SUPREME COURT

FOR THE STATE OF ARIZONA

RICHARD DALE STOKLEY, Petitioner, vs. COCHISE COUNTY SUPERIOR COURT, Honorable Matthew Borowiec, Judge of Cochise County Superior Court, Respondents, vs. STATE OF ARIZONA ex rel. GRANT WOODS, ATTORNEY GENERAL Petitioner.	Supreme Court No. CV-97-0203-SA Cochise County No. CR-91 00284A **REPLY TO STATE'S RESPONSE TO PETITIONER'S PETITION FOR SPECIAL ACTION**

Petitioner, RICHARD DALE STOKLEY, by and through his attorney undersigned, hereby respectfully requests that this Court accept jurisdiction of his Petition for Special Action and grant him relief for the reasons set forth in the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 10 day of June, 1997

CARLA G. RYAN
Law Office of Carla G. Ryan
6987 North Oracle Road
Tucson, AZ 85704
State Bar Nos. 004254/017357
Attorney for Petitioner

6/10/97

JURISDICTION

The State argues in it's Answer To Special Action (hereinafter "Response"), that this Court does not have jurisdiction in this matter; however, special action jurisdiction is appropriate where there is "no equally plain, speedy and adequate remedy by appeal" and where the case presents unique circumstances. *State v. Sherrill*, 162 Ariz. 164, 781 P.2d 642 (Ct. App. 1989); *Finck v. Superior Court ex rel. County of Maricopa*, 177 Ariz. 417, 868 P.2d 1000 (Ct. App. 1989); *City of Tucson v. Fahringer*, 162 Ariz. 159, 781 P.2d 637 (Ct. App. 1988). Furthermore, in cases where an issue presents a question of statewide importance, special action jurisdiction is essential. *Trebesch v. Superior Court*, 175 Ariz. 284, 855 P.2d 789 (Ct. App. 1993).

In this case, the issues presented affect all indigent defendants that are afforded court appointed counsel and this is Petitioner's only "remedy" since he would lose his opportunity at a "real" Petition for Post Conviction Relief if this Court does not intervene. Petitioner would be limited to the two issues raised on the Rule 32 (which was prepared by an attorney who did not appear to undertake the necessary investigation to determine whether other issues were viable) and would, therefore, be precluded from federal review on all other issues not raised at this time or on appeal.

The State suggests that this Petition for Special Action is not needed since Levitt "raised the counsel-substitution issue in her petition for review..." and that therefore, this issue is "before this Court in the ordinary course of the Rule 32 proceedings." Levitt "raised" the issue only to state that the trial court's "decision to appoint new counsel was originally the correct one and should have remained intact" and to defend her own representation. [1] She states that she does not adopt any of

[1] The Petition for Review was filed on May 6, 1997, after the Special Action was filed.

the issues raised by undersigned and that the "laundry list" of issues are "meritless", "already raised", "cannot be properly argued", "contrary to well-established caselaw" and "not supported by the facts of the case". Not only does she challenge the potential postconviction issues, but she refutes them individually, which is the State's job, without performing any investigation on behalf of Petitioner.

More importantly, this Court is in a position to allow the trial court to correct the errors committed rather than allow this issue to be relitigated at a later date.[2] In fact, the federal courts have consistently requested that state proceedings be complete and not piece meal when they originally are brought into federal court. *French v. United States*, 416 F.2d 1149 (1969). On March 22, 1996, during oral arguments before the Ninth Circuit Court of Appeals in *Lagrand v. Stewart*, Case No. 95-99010 and 95-99011, Judge Pregerson stated to the Assistant Attorney General:

> You know... if a little more care were taken at the beginning and a little more, oh, concern shown, I'm speaking very generally now,... we wouldn't have these issues. By appointing people like _____ and keeping evidence out[3],... what goes on is just fertile ground for creating issues that are going to have a life of their own for years and years and years to come... where maybe if just a little bit more care and consideration [were taken] at the start.

FACTUAL BACKGROUND[4]

The State indicates in it's Response that Levitt "timely filed the Rule 32 petition". As stated in Petitioner's Petition for Special Action, Levitt filed the Petition for Post Conviction Relief nine (9) months and two continuances[5] after she was

---

[2] Interestingly almost all the cases cited by the State in it's Response were brought before this Court by Petitions for Special Action.

[3] Judge Pregerson was referring to limiting hearings when he said "and keeping evidence out,..."

[4] Undersigned will only briefly address some of the "facts" in the State's factual background.

appointed[6].

The State further complains that Levitt had already been paid to review the file and that therefore she should not have been allowed to withdraw. The prosecutor is not the one in charge of caring for the county purse; that is, and should be, within the discretion of judges. That also should not be the prevailing reason to not allow a change of counsel.

The State also accuses undersigned of immediately filing with the Court requests for co-counsel and a request for time to properly prepare. Apparently the State is concerned that undersigned began to work on the case as soon as she was appointed, which is not improper. The State also complains that the motions filed by undersigned were an abuse of the procedure; however, undersigned has not gone outside the scope of the rules of procedure. [7],[8]

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[5] One request for a continuance was filed over 40 days late.

[6] *Rule 32.4(c)* of the *Arizona Rules of Criminal Procedure* states that in capital cases, appointed counsel shall have one hundred and twenty (120) days to file the petition.

[7] *Rule 32.6(d)* states that:

> After the filing of a post-conviction relief petition, no amendments shall be permitted except **by leave of court upon showing of good cause.**

(Emphasis added). Undersigned requested the trial court to give her leave to amend the Rule 32. The Comment to *Rule 32.6* states that "section (d) provides a liberal policy towards amendments to the pleadings."

[8] In support of his claim that undersigned somehow acted improperly, the State cites *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992) for his contention that undersigned is predisposed to disobey court orders.

When *Atwood* was decided capital litigation was still largely undefined. *Atwood* now serves as a guideline, to some extent, for capital cases in Arizona. This case has been cited 131 times in Arizona opinions, as well as by the Illinois, Texas and Utah Supreme Courts. Capital Litigation is evolving. We all should be learning from our prior mistakes.

Although undersigned raised an extraordinary number of issues in that case, she did so in good faith and is disturbed at the fact that the State would use the one case in undersigned's 23 years of practice in order to justify his improper attacks and to support his argument that undersigned has a history of "disobedience". See, *State v. Bible*, 175 Ariz. 549, 858 P2d. 1152, 1198 (1993), cert. denied, _____ U.S._____, 114 S.Ct. 1578 (1994).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY VACATING ITS ORDER GRANTING PERMISSION TO HARRIETTE LEVITT TO WITHDRAW AND REINSTATING HER AS COUNSEL OF RECORD.

A. This Court should grant jurisdiction because Petitioner has no other equally plain, speedy and adequate remedy.

The State cites *Washington v. Superior Court*, 180 Ariz. 91, 881 P.2d 1196 (Ct. App. 1994) to interpret "no adequate remedy by way of appeal" to apply in cases where there is no appeal available[9]. However, in *Washington, supra,* the Court of Appeals noted that there were a combination of reasons that it "exercised its discretion to resolve this matter now", one of which was clear error of the trial court.

Petitioner is only allowed **one** petition for post conviction relief since any claims not raised will be precluded in a subsequent petition[10]. Petitioner has lost the opportunity to raise any claims not raised by Levitt in her petition. Therefore, those issues cannot be considered on a Petition for Review to this Court, contrary to the State's assertion that this Court will review those issues in the "ordinary course of the Rule 32 proceedings." Furthermore, Petitioner has also lost his opportunity to raise those issues in federal court, since they were not raised in the state court. Thus, these errors cannot be "remedied" via direct appeal.

The State also argues that since Petitioner has been represented at all times by Levitt that he is not "harmed." "Representation" is more than just a warm body.

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[9] The defendant in that case waived direct appeal. Post conviction relief was held to be too remote to provide relief.

[10] A defendant shall be precluded from relief under this rule based upon any ground:

(3) That has been waived at trial, on appeal, or in a **previous collateral proceeding**.

Arizona Rules of Criminal Procedure, Rule 32.2(a)(3). (Emphasis added).

There must be some representation:

> [The trial attorney's] representation at the sentencing hearing amount[ed] in every respect to **no representation at all**,... and the total absence of advocacy falls outside *Strickland's*[11] wide range of professional competent assistance...

Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995). The fact that "[t]here has been no interruption in [Petitioner's] representation" is irrelevant. The pleadings that Levitt filed on behalf of Petitioner speak for themselves and they do not suggest zealous representation[12].

The State argues that Levitt studied the trial records. In Levitt's second motion to continue the Petition for Post Conviction Relief, filed November 7, 1996, she indicated that she did not receive the transcripts until October 31, 1996 and that she would be out of town from November 15, 1996 until December 2, 1996. Petitioner's Petition for Post Conviction Relief was filed on January 8, 1997[13], therefore, she had very limited time to work on Petitioner's case.

A national study concluded that the median hours spent by a competent attorney during a capital post conviction case is 582 hours. ABA, Standing Committee On Legal Aid And Indigent Defense Bar Information (Prepared by the Spangenberg Group). "Time and Expense Analysis in Post-Conviction Death Penalty Cases," (Feb. 1987). The Eighth Circuit also concluded that the "average time that a competent lawyer labors in post conviction review of a single death sentence is approximately

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[11] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

[12] See, Motion For Reconsideration And Request Leave To Amend Petition For Post Conviction Relief, Exhibits G and H, filed with the Petition for Special Action."

[13] Additionally the Petition consisted of seven (7) pages- only 3 1/2 of which contained legal arguments.

one-quarter of a lawyer's billable hours for a year." *Mercer v. Armontrout*, 864 F.2d 1429 (8th Cir. 1988).[14]

The State also asserts that Levitt, upon her reinstatement, filed a "lengthy and comprehensive Petition for Review by this Court." That petition consisted of 3 1/2 pages of legal arguments in favor of Petitioner and the remainder of the pleading was dedicated to not only defending her actions, but also arguing procedural bar of all other potential issues Petitioner may have had!

The State is correct that an indigent defendant cannot choose any particular attorney. Petitioner did not choose or even request undersigned, Cochise County did. The State also is correct that the attorney client relationship does not have to be "meaningful" and that there is no right to another attorney when a client has "lost confidence" in his attorney. However, that is not the case here. As stated by Levitt, there was a "total breakdown of the attorney-client relationship" (emphasis added) and "irreconcilable differences" arose between Levitt and Petitioner. If there is a "total breakdown in the attorney-client relationship, the court [is] required to dismiss counsel and appoint another attorney[15]." *United States v. Wadesworth*, 830 F.2d 1500 (9th Cir. 1987).

The State is correct that Petitioner cannot choose his own claims when he has counsel representing him:[16] a defendant is stuck with the "strategic decisions" of his

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[14] That is not to say this much time is required. But it is a guide as to the time and energy which should be applied in capital cases.

[15] Minimally, the trial court should have held a hearing to inquire into the source of the conflict. *Bland v. California Dept. of Corrections*, 20 F.3d 1469 (9th Cir. 1994).

[16] Additionally, Petitioner is not capable of representing himself nor trained to represent himself. .

attorney. However, defense counsel needs all of the vital information necessary for him or her to make informed decisions. *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994). Counsel must conduct a reasonable, informed investigation or make a reasonable decision not to investigate, *Id*, otherwise, "strategic decisions" based on a mistaken understanding of the facts or law will be grounds for ineffective assistance of counsel. *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991).

B. The State has no standing to petition the trial court, or any other court, regarding the appointment of counsel.

The State argues that not only does a prosecutor have standing to object to the appointment of counsel of indigent defendants, but that the prosecutor has an "affirmative duty" to protect all parties involved, including Petitioner. The State claims that there is "no bright-line rule" for prosecutor's standing to be heard since a prosecutor is a minister of justice. This issue has been decided in *Knapp v. Hardy*, 111 Ariz. 107, 523 P.2d 1308 (1974). This Court unequivocally held that a prosecutor had no standing to object to the association of counsel for an indigent criminal defendant. *Id.* "Not only does it strike at the very heart of the adversary system...," but it is "unseemingly" as well. *Id.* (citation omitted).

Although the State attempts to narrow the holding of *Knapp, supra*, by citing *State v. Madrid*, 105 Ariz. 534, 468 P.2d 561 (1970), the State concedes that in *Madrid*, this Court held that the prosecution can not "participate in the selection or rejection of its opposing counsel." The State also cites *State v. Evans*, 129 Ariz. 153, 629 P.2d 989 (1981). In *Evans*, this Court held that under *Knapp, supra*, the prosecutors did not have standing "to question the representation of the defendants." *Id.* This Court found that the "Board of Supervisors" would be the appropriate party to

object since they are the "paying" party. *Id.*

In it's search to limit this Court's holding in *Knapp, supra*, the State cites *Alexander v. Superior Court*, 141 Ariz. 157, 685 P.2d 1309 (1984). This case actually supports undersigned's position that the State has no standing to select counsel for Petitioner. *Id.* In that case the State brought a motion to disqualify defense counsel citing a conflict of interest. *Id.* This Court denied the State's motion citing *Madrid, supra, Knapp, supra* and *Rodriguez v. State*, 129 Ariz. 67, 628 P.2d 950, (1981), and held that:

> For the State to participate in the selection or rejection of its opposing counsel is unseemingly if for no other reason than the distasteful impression which could be conveyed.

Alexander at 165-166. *Alexander* did not "narrow" this Court's holding in *Knapp*, but instead reiterated the importance of a completely adversarial system. The same is true of another case cited by the State, *Gomez v. Superior Court*, 149 Ariz. 223, 717 P.2d 902 (1986). *Gomez* did not decide the issue of whether the State had standing to object, instead the issue presented was:

> Is it ethically proper for an attorney-city councilman to defend a criminal defendant in any court where witnesses against that defendant are officers of that city's police department?

Gomez at 224. As in *Alexander* in *Gomez* the prosecutor filed a motion to disqualify citing a conflict of interest. Again, this Court denied the State's motion and cited *Alexander, supra, Madrid, supra, Knapp, supra* and *Rodriguez, supra.*

Gomez at 226.

The State cites *State v. Vickers*, 180 Ariz. 521, 885 P.2d 1086 (1994), to support it's theory that the standard of review to determine the standing of a prosecutor to object to the appointment of defense is a "totality of circumstances" approach.

However, none of the cases cited by the State, including *Vickers*, cites this standard. The State is not only attempting to narrow the *Knapp* holding for it's own convenience, but it is also attempting to create a standard that favors it's position. In *Vickers, supra*, before the trial the prosecutor filed a motion to put the Court on notice that defense counsel's representation was ineffective. On appeal, this Court used the motion as "evidence" of trial counsel's ineffectiveness and remanded that case for retrial. *Id.* Furthermore, the trial court did not grant the prosecutor's motion and the trial court, nor this Court, addressed the issue of standing.

Vickers is a very different case from the present one. In *Vickers* the prosecutor was attempting to cure the error and prejudice **against** the defendant. The State actually acknowledged that in *Vickers* the failure to replace defense counsel cost time and five years later being back to square one." (Response p. 12). (Emphasis added). Unfortunately, this could happen in this case if Levitt is allowed to remain on Petitioner's case.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S REQUEST FOR CO-COUNSEL.

Since the State did not address this issue in it's Response Petitioner will rely on the arguments made in the motions filed before the trial court. *See*, Attachments 2 and 5 to the Petition for Special Action.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S PROSECUTOR MISCONDUCT MOTION.

A. The circumstances in Petitioner's case did not justify prosecutor's behavior.

The State claims that it was justified in it's behavior and that it's attempt to reinstate Levitt is not an attempt to select defense counsel, but instead it's an attempt to return to the "*status quo*". However, this return to the "*status quo*" has the effect of

keeping Petitioner from receiving an adequate and meaningful Rule 32. If the State was so committed to it's role as a "minister of justice" it would be advocating for a full and fair presentation of all of Petitioner's claims and not interfering with his right to raise his claims. The State asserts it objected to avoid the "unnecessary expense of starting over." However, as stated by Judge Pregerson of the Ninth Circuit Court of Appeals,[17] by limiting proceedings in this fashion what the State is really doing is creating issues that may have a life of their own for years and years.

The State is attempting to soften the pleadings it filed by stating that "[t]he State's original request for reinstatement expressed no preference for Ms. Levitt in particular..." In the State's Motion To Vacate Dismissal Of Counsel, Or Alternatively, To Clarify Role Of Substituted Counsel, the first sentence read "[t]his Court should reinstate attorney Harriette Levitt as Stokley's Rule 32 counsel and should vacate the appointment of Carla Ryan..." In support of it's position, the State attacked undersigned personally. The State also argues that it's attempt to limit defense counsel's role was made in "good faith". This position seems to be contradictory. The State may object to any motions or requests by the defense. However, they cannot dictate what the defense can file. It would be fundamentally unfair, and an annihilation of the adversarial system if the prosecution was allowed to, before the fact, petition a court to limit the motions that could be filed by defense counsel. This not only would violate Petitioner's due process rights but also his *Fifth and Sixth Amendments* right to counsel, since Petitioner would essentially be represented by the State. Moreover, undersigned could not in good faith proceed to file a Petition for Review based on the Petition for Post Conviction Relief that was filed on behalf of Petitioner without first doing her own investigation and review so that she could make informed decisions.

[17] Cited on page 2 of this Reply.

After all, undersigned has an ethical duty to zealously represent Petitioner.

Whether or not undersigned intended to "merely pick up where Ms. Levitt had left off" or to attempt to re-open the proceedings, should not be the concern of the State. It is the trial court's responsibility to rule on any defense motions. Furthermore, the purpose of a Rule 32 is to open the record and make it complete for federal review. Undersigned is not attempting to "inundate" the trial court or this Court with "dubious claims", just to preserve all issues in the record so that the federal courts can do their job. "One of the purposes of [a] Rule 32 is to furnish an evidentiary forum for the establishment of facts underlying a claim for relief, when such facts have not previously been established on the record." *State v. Scrivner*, 132 Ariz. 52, 643 P.2d 1022 (1982).

The State also argues that it did not act improperly since Judge Boroweic "could have taken the same action [of reinstating Levitt] *sua sponte*, regardless of the origin of the idea." This is merely an attempt to convince this Court that it did not interfere with the attorney-client relationship, the trial court's appointment of counsel and the principles of the adversary system. It's not reasonable to assume that the trial court would have vacated it's own rulings without the influence of the State.

B. The Prosecutor's behavior was in violation of legal and ethical duties.

The State in it's Response, for the first time, expresses concern for the victims, stating that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." This is not the only duty of a prosecutor. A prosecutor is not simply a "lawyer", a prosecutor has the responsibility of a minister of justice and not just simply that of an advocate; this responsibility carries with it specific obligations to see that a defendant is accorded justice. *State v. Noriega*, 142 Ariz. 474, 690 P.2d 775 (1984); *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984). In order to achieve justice, the competition must be fair. *E.R. 3.4.*

The State concedes that among it's responsibility to seek justice is a duty not only to protect the victim's rights, but also the defendant's rights. Response at 16; *See also, Fisher, supra.* The State cites *A.R.S.* § 13-4435(A) and (B) in support of the argument that the trial court must take into account the victims' right to a speedy trial. While this is correct, the trial court must also take into account, the constitutional rights of Petitioner that will be violated as a result of a deficient post conviction proceeding that will result in Petitioner's execution. Amendments *Five, Six, Eight* and *Fourteen* of the United States Constitution.

While undersigned is not attempting to invalidate the concerns of the victims, this is the first time the State has "used" the victims as justification for the State's intervention. The State is now claiming that it has "standing" via the victims where as, in it's pleadings before the trial court it conceded "[o]f course the State has no role in choosing counsel for a defendant..." Attachment 11 to the Petition for Special Action.

The State asserts that this Court should not base it's decision "on an attempt to somehow teach an attorney a lesson." Response at 17 (Citation omitted). Petitioner has set forth his concerns and his request for relief in his Prosecutor Misconduct Motion And Motion To Remove The Attorney General's Office From Or, In The Alternative, To Hold The Attorney General's Office In Contempt Or Award Attorney Fees. Attachment 6 to the Petition for Special Action. The prosecutor in this case interfered with Petitioner's attorney-client relationship, attacked undersigned in an unprofessional, disrespectful and slanderous manner, and violated not only the Ethical Rules of Professional Responsibility but also Petitioner's constitutional rights.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DISREGARDING PETITIONER'S MOTION FOR RECONSIDERATION AND REQUEST LEAVE TO AMEND PETITIONER'S PETITION

FOR POST CONVICTION RELIEF.

In support of it's position the State argues that Judge Boroweic did not abuse his discretion and that although the decision to reinstate Levitt was taken after the State filed it's pleadings opposing undersigned's appointment, limiting the scope of undersigned's appointment and opposing the appointment of co-counsel, that Judge Boroweic could have decided to reinstate Levitt *sua sponte*. The State constructs other facts and argues that Judge Boroweic "failed to note... that Ms. Levitt's reason for withdrawal was invalid", and that, as the proceedings continued, Judge Boroweic became concerned, *sua sponte*. Judge Boroweic abused his discretion in allowing the State to mandate who should represent Petitioner. Judge Boroweic further abused his discretion in not allowing undersigned to Amend the Petition for Post Conviction Relief filed by Levitt. Judge Boroweic abused his discretion when he denied Petitioner's Motion for Prosecutorial Misconduct thereby sanctioning the inappropriate behavior of the State. And Judge Boroweic abused his discretion when he failed to even investigate Petitioner's claims against Levitt.

CONCLUSION

This Court should accept jurisdiction and decide these issues because they involve Petitioner's fundamental right to due process because of his impending death sentence and because of his statutorily mandated right to Post Conviction Relief. In addition, as set forth in the Motion for Reconsideration, Petitioner has many potential Post Conviction issues that have not been decided, or even argued, on their merits.

In order to avoid additional litigation, Petitioner should be allowed a meaningful Petition for Post Conviction Relief with competent counsel and not a "sham" proceeding.

///

RESPECTFULLY SUBMITTED this 10 day of June, 1997

LAW OFFICE OF CARLA G. RYAN

By Carla G. Ryan
Carla G. Ryan
Attorney for Petitioner

IN THE SUPREME COURT

FOR THE STATE OF ARIZONA

THE STATE OF ARIZONA, Respondent, vs. RICHARD DALE STOKLEY, Petitioner.	Supreme Court No. CV-91-0203-SA Cochise County No. CR-91 00284A **REQUEST TO APPOINT COUNSEL FOR THE LIMITED PURPOSE OF APPEARING BEFORE THE ARIZONA SUPREME COURT ON A SPECIAL ACTION; PETITION FOR SPECIAL ACTION; AND REQUEST TO STAY ALL SUPERIOR COURT PROCEEDINGS**

Petitioner, RICHARD DALE STOKLEY, by and through the attorney undersigned, hereby respectfully requests that this Court to appoint and subsequently compensate, undersigned, for the limited purpose of preparing a Petition for Special Action before this Court because of the profound constitutional issues raised regarding appointment of counsel.

Petitioner also respectfully requests that this Court stay all Superior Court proceedings pending the litigation of this Petition for Special Action.

Patricia Jimenez

for CARLA G. RYAN
Law Office of Carla G. Ryan
6987 North Oracle Road
Tucson, AZ 85704
State Bar Nos. 004254/017357

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to entertain this petition and to grant the relief requested by virtue of the Arizona Constitution, Article VI, § 5 and Rule 4, of the Rules of Procedure for Special Actions, 17B A.R.S.

Because Petitioner has been sentenced to death and will be executed, this Court has jurisdiction. A.R.S. §§ 12-120.21; 13-4031.

STATEMENT OF THE ISSUES

(1) Whether the trial court abused its discretion by vacating its order granting permission to Harriette Levitt to withdraw and reinstating her as counsel of record?

(2) Whether the trial court abused its discretion by denying Petitioner's Request for Co-counsel?

(3) Whether the trial court abused its discretion by denying Petitioner's Prosecutor Misconduct Motion And Motion To Remove The Attorney General's Office Or, In The Alternative, To Hold The Attorney General's Office In Contempt And To Award Attorney Fees?

(4) Whether the trial court abused its discretion by disregarding Petitioner's Motion for Reconsideration and Request for Leave to Amend Petition for Post Conviction Relief?

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY[1]

Petitioner was convicted of two counts of Kidnapping a Minor, one count of Sexual Conduct with a Minor and two counts of First Degree Murder on March 27, 1992. Petitioner was subsequently sentenced to Death on the First Degree Murder counts.

This Court affirmed the conviction and sentences on June 27, 1995. A Petition for Writ of Certiorari was denied by the United States Supreme Court on January 16, 1996. This Court issued its mandate and automatically filed a Notice of Post Conviction Relief on January 26, 1996, pursuant to *Rule 32* of the *Arizona Rules of Criminal Procedure*.

On April 17, 1996, Harriette Levitt was appointed by Cochise County to represent Petitioner "in all further appeal proceedings", presumably his Rule 32 or Petition for Post Conviction Relief, a state habeas proceeding. On September 27, 1996 Ms. Levitt filed a Motion to Extend Deadline for Filing Rule 32 Petition for 60 days. The Petition was originally due August 17, 1996 and pursuant to that Motion the trial court extended the deadline to December 2, 1996. On November 7, 1996 Ms. Levitt filed a second Motion to Extend Deadline for Filing Rule 32 Petition for an

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[1] Petitioner has only set forth the procedural history and facts that are relevant to the issue of this Petition for Special Action. The facts of the crime are incorporated by reference in *State v. Stokley*, 182 Ariz. 505, 898 P.2d 454 (1995).

additional 60 days. The trial court granted that request and extended the Deadline to January 8, 1997.

On January 8, 1997 Petitioner's Petition for Post Conviction Relief was filed.[2] On March 6, 1997 that Petition was summarily denied by the trial court. On March 12, 1997, Petitioner's counsel, Ms. Levitt, requested to withdraw, citing irreconcilable differences between her and Petitioner. This was after Petitioner filed his own objection with the trial court to the Petition for Post Conviction Relief filed by Ms. Levitt. The trial court then appointed undersigned to represent Petitioner "for the completion of his Rule 32 petition".

On March 17, 1997, the State filed a Motion To Vacate Dismissal Of Counsel Or, Alternatively, To Clarify Role Of Substituted Counsel. Attachment 1. In that Motion the State asked the trial court to remove undersigned from the case and reinstate Ms. Levitt as counsel for Petitioner. *Id.* On March 18, 1997 undersigned filed a Request For Extension To File A Motion For Reconsideration in order to respond to that Motion. Also, on March 18, 1997 Petitioner filed a Request To Have Co-counsel Appointed. Attachment 2. In response to that Motion the State filed an Opposition To Motion To Appoint Co-counsel. Attachment 3. Because of the substance and mean spirited language of the State's Motion To Vacate Dismissal Of Counsel Or, Alternatively, To Clarify Role Of Substituted Counsel and the State's Opposition To Motion To Appoint Co-counsel, Petitioner filed a Reply To Motion To Vacate Dismissal Of Counsel Or,

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[2] It consisted of a total of eight pages, with only 31/2 pages of legal argument. There was not request for funds for experts or for an investigator.

Alternatively, To Clarify Role Of Substituted Counsel (Attachment 4), and a Reply to the State's Opposition to Motion to Appoint Co-counsel (Attachment 5). Also filed was Prosecutor Misconduct Motion And Motion To Remove The Attorney General's Office Or, In The Alternative, To Hold The Attorney General's Office In Contempt And To Award Attorney Fees (Attachment 6), and a Reply to the Opposition of that Motion (Attachment 7) were filed by undersigned. The State filed an Opposition to Motion To Remove Attorney General's Office From the Case Or To Hold The Office In Contempt Or Award Attorney Fees. Attachment 11. Because undersigned had to reply to Motions from the State Opposing her appointment, the appointment of co-counsel and attempting to dictate the pleadings undersigned would file, undersigned filed a second Request for Extension to File a Motion for Reconsideration on April 2, 1997.

To ensure that the Motion for Reconsideration and Request for Leave to Amend Petition for Post Conviction Relief (Attachment 8) would be timely, undersigned filed a Request to Accept the Filing of a Motion For Reconsideration One Day Late (Attachment 9). Both Motions were filed April 16, 1997.

On April 24, 1997[3], the trial court granted the State's request and vacated its order granting Ms. Levitt permission to withdraw and reinstated her as counsel of record. Attachment 10. In that same minute entry the trial court denied Petitioner's Request for Co-counsel and his Prosecutor Misconduct Motion And Motion To Remove The Attorney General's Office Or, In The Alternative, To Hold The Attorney

[3] This minute entry was not filed with the Clerk's Office until April 29, 1997 and was received by undersigned on May 1, 1997.

General's Office In Contempt And To Award Attorney Fees. *Id.* Although the trial court stated that it "considers all pending matters in this court resolved", it did not specifically deny Petitioner's Motion for Reconsideration and Request Leave to Amend Petition for Post Conviction Relief. *Id.* In that Motion undersigned set forth a list of potential postconviction issues, incuding but not limited to, claims of ineffective assistance of prior postconviction counsel. Instead the trial court granted a Motion to Extend the Deadline for Filing a Petition for Review or in the Alternative a Motion for Reconsideration, that was presumably filed by Ms. Levitt on March 11, 1997 and extended the deadline to May 15, 1997. Attachment 10.

Petitioner has no equally plain speedy and adequate remedy by appeal because Petitioner will suffer harm if these requests and motions are not granted. Petitioner's Petition for Post Conviction Relief constitutes a sham and farce and not a full review with all issues being raised as is required by Rule 32 of the Arizona Rules of Criminal Procedure.

This Court should accept jurisdiction and decide these issues because they involve Petitioner's constitutional, fundamental right to due process, because of his impending death sentence, and because of his statutorily mandated right to postconviction relief.

This Petition for Special Action has been filed with the Arizona Supreme Court because Petitioner is under a sentence of death and the Arizona Court of Appeals does not have appellate jurisdiction. A.R.S § 12-120.21(A)(1).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY VACATING ITS ORDER GRANTING PERMISSION TO HARRIETTE LEVITT TO WITHDRAW AND REINSTATING HER AS COUNSEL OF RECORD.

As stated in Petitioner's Reply to Motion to Vacate Dismissal of Counsel, Or Alternatively, To Clarify Role of Substituted Counsel, the State has no standing to challenge the appointment of counsel and/or to even attempt to dictate what motions can or cannot be filed by Petitioner's counsel. *See*, Attachment 4[4].

In the Motion for Reconsideration Petitioner supported Ms. Levitt's decision to withdraw as counsel, citing irreconcilable differences by supplementing the trial court with correspondence by Petitioner to Judge Borowiec, Ms. Levitt and Denise Young at the Arizona Capital Representation Project. Attachment 8.

The trial court abused its discretion by allowing the State to dictate who should be appointed as counsel and what if any motions should be filed, where the State admits that they have no standing. Attachments 10 and 11.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S REQUEST FOR CO-COUNSEL.

Petitioner will rely on the arguments made in the motions filed before the trial court. *See*, Attachments 2 and 5.

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[4] In order to save time and resources, undersigned will refer to arguments made in the pleadings that were already filed and incorporate these into this Petition for Special Action.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PETITIONER'S PROSECUTOR MISCONDUCT MOTION AND MOTION TO REMOVE THE ATTORNEY GENERAL'S OFFICE OR, IN THE ALTERNATIVE, TO HOLD THE ATTORNEY GENERAL'S OFFICE IN CONTEMPT AND TO AWARD ATTORNEY FEES.

Petitioner will rely on the arguments made in the motions filed before the trial court. *See*, Attachments 6 and 7.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DISREGARDING PETITIONER'S MOTION FOR RECONSIDERATION AND REQUEST FOR LEAVE TO AMEND PETITIONER'S PETITION FOR POST CONVICTION RELIEF.

Since this is Petitioner's first Petition for Post Conviction Relief, this is his first opportunity to raise any claims of ineffective assistance of counsel at the trial, sentencing and appellate stages. *State v. Carver*, 160 Ariz. 167, 771 P.2d 1382 (1977) (ineffective assistance of counsel claims must be raised in a petition for post conviction relief); *State v. Herrera*, 182 Ariz. 642, 905 P.2d 1377 (App. 1995) (an allegation of ineffective assistance of counsel is encompassed within the scope of Rule 32.1 as a claim that a defendant's conviction or ... sentence was in violation of the Constitution of the United States of the State of Arizona). In order for Petitioner to properly raise any ineffective assistance of counsel claims he needs to have competent counsel at the postconviction stage.

> To decide that a defendant claiming ineffective trial counsel is not entitled to representation in his first [state] habeas corpus proceeding, in a state that does not allow trial counsel's effectiveness to be challenged on direct appeal, would be to conclude that the defendant is not entitled in

any form to an attorney's assistance in presenting a fundamental constitutional claim. We will not so hold.

MacKall v. Murray, 1997 W.L. 134374 (4th Cir. March 25, 1997).

Petitioner will also rely on the arguments made in the motions filed before the trial court. *See*, Attachments 8 and 4.

CONCLUSION

This Court should accept jurisdiction and decide these issues because they involve Petitioner's fundamental right to due process, because of his impending death sentence, and his statutorily mandated right to postconviction relief. In addition, as set forth in the Motion for Reconsideration (Attachment 8), Petitioner has many potential postconviction issues that have not been decided on their merits. Petition needs to have these issues litigated. The federal courts have consistently requested that these proceedings be completed not piece-meal, but in an effective, competent manner. *French v. United States*, 416 F.2d 1149 (1969).

RESPECTFULLY SUBMITTED this 7th day of May, 1997

LAW OFFICE OF CARLA G. RYAN

By Sabrina Mayorga
for Carla G. Ryan
Attorney for Petitioner

Copy of the foregoing mailed/delivered this 7th day of May, 1997, to:

The Hon. Judge Borowiec
Cochise County Superior Court
P.O. Drawer CT
Bisbee, AZ 85603

Eric Olsson
Office of the Attorney General
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Tucson, AZ 85701

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Arizona State Prison - Florence
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Harriette Levitt
485 S. Main Ave
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Arizona Capital Representation Project (informational copy only)
Federal Public Defender's Office
222 N. Central Ave.
Phoenix, AZ 85004

APPENDIX

1: MOTION TO VACATE DISMISSAL OF COUNSEL OR ALTERNATIVELY, TO CLARIFY ROLE OF SUBSTITUTED COUNSEL 03/17/97

2: REQUEST TO HAVE CO-COUNSEL APPOINTED 03/18/97

3: OPPOSITION TO MOTION TO APPOINT CO-COUNSEL 03/20/97

4: REPLY TO MOTION TO VACATE DISMISSAL OF COUNSEL, OR ALTERNATIVELY, TO CLARIFY ROLE OF SUBSTITUTED COUNSEL 03/24/97

5: REPLY TO OPPOSITION TO MOTION TO APPOINT CO-COUNSEL 04/01/97

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7: REPLY TO THE OPPOSITION TO THE MOTION TO REMOVE ATTORNEY GENERAL'S OFFICE FROM OR HOLD THE OFFICE IN CONTEMPT OR AWARD ATTORNEY FEES IN THE STOKLEY CASE 04/10/97

8: MOTION FOR RECONSIDERATION AND REQUEST LEAVE TO AMEND PETITION FOR POST CONVICTION RELIEF 04/16/97

9: REQUEST TO ACCEPT THE FILE A MOTION FOR RECONSIDERATION ONE DAY LATE 04/16/97

10: MINUTE ENTRY DATED 04/24/97

11: OPPOSITION TO MOTION TO REMOVE ATTORNEY GENERAL'S OFFICE FROM THE CASE OR HOLD THE OFFICE IN CONTEMPT OR AWARD ATTORNEY FEES 04/01/97

(SPACE BELOW FOR FILING STAMP ONLY)

COPY OF ORIGINAL

LAW OFFICES OF
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FILED
97 MAY -7 AM 11:04
DEPUTY CLERK
CLERK OF THE SUPERIOR COURT

Attorney for Bar Number 7077

Defendant/Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff/Respondent, vs. RICHARD DALE STOKLEY, Defendant/Petitioner	NO. CR-9100284A PETITION FOR REVIEW (Judge Borowiec)

COMES NOW the Defendant, by and through his attorney undersigned, and hereby petitions the Court of Appeals for a review of the denial of his Petition for Post-Conviction Relief.

RESPECTFULLY SUBMITTED this 6th day of May, 1997.

HARRIETTE P. LEVITT
Attorney for Defendant/Petitioner

5/6/97

Copy of the foregoing delivered
this 6th day of May, 1997, to:

Honorable Judge Borowiec
Cochise County Courthouse
P.O. Box Drawer CK
Bisbee, AZ 85603

Eric Olsson
Assistant Attorney General
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And Mailed to:

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Carla Ryan
6987 N. Oracle Road
Tucson, Arizona 85704-4224

On the Fourth of July weekend, 1991, a community celebration was staged near Elfrida. The focus of these celebrations was the Best Yet Service Station, located near the state highway. Mary Snyder and Mandy Meyers, two teenage girls from Elfrida, were among those in attendance. Petitioner Richard Stokley was also in attendance, performing as a stuntman in the "Old West" reenactment. He was visited at the site by Randy Brazeal.

Mary and Mandy, along with a number of other children, camped out at the service station during the celebration. The youngsters were eventually separated by gender. Mary and Mandy were seen leaving the girls' tent at approximately 1:00 a.m. on July 8, 1991. They were observed entering a car occupied by Petitioner and Randy Brazeal. They were not seen alive again.

Randy Brazeal contacted Chandler police several hours after the crime to confess to his involvement. He stated that he and Petitioner had sexually assaulted and killed the two girls. As a result, Petitioner Richard Stokley was located and arrested at a Benson truck stop by Benson police officers Bunnell and Moncada.

Detective Sergeant Rodney Wayne Rothrock and Detective David Bunnell interviewed Petitioner. During the course of this interview, Petitioner made a full confession of his involvement in the offense. The tape of this confession was

played for the jury, and transcripts of the tape were published.

Petitioner admitted to engaging in sexual intercourse with "the brown haired girl", but denied raping her. He also admitted participating in the killings, disposing of the bodies, and burning the girls' clothing. He indicated that Randy Brazeal had been a willing and equal participant in the crimes, having had sex with both of the girls and killing one.

Petitioner later directed law enforcement officials to the scene of the crime. Search and rescue teams were dispatched to the area, and the bodies were recovered from an abandoned, muddy mine shaft.

Autopsies were performed by Cochise County Medical Examiner Dr. Guery Flores. Biological samples were taken from the victims as well as their accused assailants. Dr. Flores determined the cause of death of both victims to have been "manual" strangulation. Although a semen sample was recovered from the body of Mandy Meyers, no such examination was possible on the body of Mary Snyder, because Snyder's body cavities had filled with mud from the mine shaft. As such, it was impossible to verify the identify of her attacker.

Petitioner was charged with two counts of Kidnapping a Minor, two counts of Sexual Assault upon a Minor, two counts of Sexual Conduct with a Minor, and two counts of First-

Degree Murder. He was found guilty of all charges. A stipulated sentence of 69 years was set on the "non-capital" offenses. A death sentence imposed on each of the homicide counts.

The Arizona Supreme Court affirmed Petitioner's convictions and sentences State v. Stokley, 182 Ariz. 505, 898 P.2d 454 (1995) (Exhibit A attached). The Supreme Court found that Petitioner's attorney had made no effort to show actual prejudice of the jury at the time of trial and, therefore, refused to overturn his convictions based on the issue of change of venue. The court found it could not presume prejudice under the facts of the case, and because trial counsel made no effort to show actual prejudice by refusing to pass the panel, there was no basis upon which to find the trial court improperly denied the original motion for change of venue, 182 Ariz at 513-514.

The United States Supreme Court denied Petitioner's petition for writ of certiorari. Subsequently, a notice of post-conviction relief was filed.

On January 8, 1997, Petitioner filed a petition for post-conviction relief arguing ineffective assistance of counsel at the trial level for failure to properly preserve the motion for change of venue on appeal. Petitioner argued that trial counsel was faced with an enormous amount of pretrial publicity, as well as a petition drive to ensure that petitioner received the death penalty in this case. He

filed a motion for change of venue, but failed to adequately establish that petitioner was prejudiced by these factors. Petitioner also argued that the state had illegally suppressed Brady material related to co-defendant Randy Brazeal's involvement in a satanic cult.

After the petition was filed, Petitioner became dissatisfied with counsel undersigned and wrote letters to counsel, the court, the State Bar of Arizona, and to Denise Young of the now defunct Arizona Capital Representation Project. The court summarily denied the petition for post-conviction relief on March 6, 1997. Counsel undersigned moved to withdraw from representation of Petitioner on March 12, 1997, as a result of Petitioner's stated dissatisfaction with counsel's work. This court appointed Carla Ryan to represent the Petitioner. She then filed a motion for reconsideration and request to amend the petition for post-conviction relief on April 16, 1997. As a result of a series of motions litigated between the Arizona Attorney General's Office and Ms. Ryan, this court rescinded its order appointing Ms. Ryan and reappointed counsel undersigned to prepare a petition for review. Petitioner now requests that the Supreme Court of Arizona review the summary denial of the petition for post-conviction relief and recession of the order changing counsel.

ARGUMENT I.

a. Ineffective Assistance of Trial Counsel.

One of the key issues in the case was whether Petitioner could receive a fair trial in Cochise County. The murders occurred in a rural area where most people knew one another, the murders had received a substantial amount of publicity prior to trial and many prospective jurors had signed a petition calling for Petitioner to be prosecuted to the fullest extent of the law and to be sentenced to death for the crimes. Trial counsel filed a motion for change of venue which was denied. Petitioner claimed in his Rule 32 petition that defense counsel failed to properly preserve the venue issue for appeal by failing to object to the jury panel at the time of jury selection. The Arizona Supreme Court found there was nothing in the record to indicate that Petitioner still felt the jury was unfairly prejudiced against him, because trial counsel had not reurged the issue.

The Arizona Supreme Court's opinion mandates an evidentiary hearing on the issue of trial counsel's failure to reurge this issue. Trial counsel's failure to preserve the issue for appeal requires a factual determination of whether he did so for strategic reasons (i.e., because he felt there no longer existed an issue) or whether he fell below standards of minimal competence for attorneys. Additionally, the court needs to determine if trial

counsel's deficiency would have any effect on the ultimate outcome. Strickland v. Washington, 466 U.S. 668 104 S.Ct. 2052 80 L.Ed.2d 674 (1984).

An accused's right to be tried by a fair and impartial jury is one of the central rights guaranteed by the United States Constitution (Fifth Amendment, United States Constitution). Even though the trial court was careful to conduct voir dire in a manner designed to protect Petitioner's rights, that alone is not dispositive of the question of trial counsel's ineffectiveness in failing to preserve this issue on petitioner's behalf. The trial court's role is to be neutral. Defense counsel's role is to be an advocate for his client. Given the conduct of voir dire in the instant case and the fact that many jurors who were acquainted with the case remained on the panel, it cannot be said that trial counsel made a strategic decision not to renew the motion for change of venue without first conducting an evidentiary hearing.

b. Non-Disclosure of Brady Material.

Subsequent to the filing of the Rule 32 petition, the state submitted an Affidavit from Charles Roll, the prosecutor assigned to the case. He stated in his Affidavit that he had not received the documentation concerning Brazeal's involvement in a satanic cult and therefore could not have disclosed it to Petitioner's counsel. This Affidavit is not dispositive of the issue for several

reasons. First, it was incumbent upon trial counsel to investigate all issues surrounding the case in an effort to build a defense. The fact that Petitioner had confessed to the crime did not eliminate counsel's obligations defend his client. Obviously, the case was difficult to defend. Therefore, defense counsel should have conducted a pretrial investigation into the issues of Brazeal's satanic cult involvement. Several of Brazeal's pretrial statements were proven to be false. As explained in the Petition for Post-Conviction Relief, the evidence about Brazeal could have been used both at trial and at sentencing to minimize the extent of Petitioner's participation in the crimes. One of the court's findings, for example, was that Appellant was more culpable because he was considerably older than Brazeal and therefore directed his activities. By establishing the satanic cult issue, Petitioner's trial attorney could have negated any such conclusion.

Additionally, the prosecutor's claim that he was not in possession of these documents gives rise to a claim of newly discovered evidence. A colorable claim for newly discovered evidence is present if: the evidence appears on its face to have existed at time of trial but was discovered after trial; the petition alleges facts from which the court can conclude that defendant was diligent is discovering facts and bringing them to the court's attention; the evidence is not simply cumulative or impeaching; the evidence is

relevant to the case; and the evidence is such that it would likely have altered the verdict, find, or sentence if known at the time of trial. State v. Bilke, 162 Ariz. 51, 781 P.2d 28 (1989).

Finally, although one attorney who worked for the Cochise County Prosecutor's Office did not have possession of the documents, there is still a question as to whether Mr. Polley did. Therefore, there is still a question as to whether the information was in possession of someone at the County Attorney's office.

The evidence concerning Randy Brazeal's cult activities were highly relevant and should have been investigated by trial counsel. There is, therefore, a viable claim as to either ineffective assistance of counsel or as to newly discovered evidence. Such a claim can only be resolved through an evidentiary hearing pursuant to Rule 32.8.

c. Issues Raised By Carla Ryan.

As noted above, Carla Ryan was appointed to represent Petitioner for a short period of time, during which she filed a pleading entitled "Motion for Reconsideration and Request Leave to Amend Petition For Post-Conviction Relief". The lion's share of this document is an attack on the effectiveness of undersigned counsel, all of which is meritless. The only substantive issues argued by Ms. Ryan in the motion are related to those filed in the original Rule 32 petition by counsel undersigned.

While counsel does not adopt any of the arguments filed on Petitioner's behalf by Ms. Ryan, particularly those in her "laundry list" of "other issues", it is submitted that they should at least be addressed on the Petition for Review in order to preserve the record.

The Statement of Facts and procedural history contained in the motion are essentially correct and are hereby adopted to whatever extent the original Petition for Post-Conviction Relief does not already cover them. The arguments concerning counsel undersigned's effectiveness and competence are meritless and are not adopted. Nevertheless, because Mr. Stokley went to extremes to express his dissatisfaction with the performance of his court appointed counsel, and because counsel undersigned did request permission to withdraw, it is submitted that the court's decision to appoint new counsel was originally the correct one and should have remained intact.

With respect to the "laundry list" of claims, the following arguments, designated by the letters labelling them in the motion were already raised, either on appeal or in the Rule 32 petition: Arguments a, q and t.

The following arguments clearly relate to strategic decisions by the respective attorneys and cannot properly be urged as arguments supporting a claim of ineffective assistance of counsel: Arguments c, d, e, i, k and r.

The following arguments are contrary to well-established caselaw and should not be raised because they cannot legitimately be argued: Arguments b, h, s, u and v-DD.

The following arguments are either not supported by the facts of the case or are completely meritless. Arguments f, g, j, l-p. Specifically as to Argument j, counsel undersigned notes that she cannot in good conscience argue that a strict religious upbringing would lead anyone to commit a double homicide.

Finally, although counsel undersigned did not request funds for an investigator, there is no basis to conclude that Petitioner received a less than competent representation on his petition. Not every case necessitates hiring expert witnesses or investigators when an attorney can conduct such investigation herself. As evidenced by the affidavits attached to the Petition for Post-Conviction Relief, an investigation of those matters which were raisable was conducted.

Despite the fact that the arguments contained in Ms. Ryan's motion are inappropriate and largely meritless, it is submitted that new counsel should have been kept on the case. Additionally, the arguments raised in the Petition for Post-Conviction Relief and affidavits appended thereto, raised a colorable claim which would have entitled the Petitioner to an evidentiary hearing. Review is therefore

requested of the trial court's summary dismissal of the petition. A remand for hearing is mandated.

RESPECTFULLY SUBMITTED this 6th day of May, 1997.

HARRIETTE P. LEVITT
Attorney for Defendant/Petitioner

Copy of the foregoing delivered
this 6th day of May, 1997, to:

Honorable Judge Borowiec
Cochise County Courthouse
P.O. Box Drawer CK
Bisbee, AZ 85603

Eric Olsson
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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

THE STATE OF ARIZONA, Respondent, vs. RICHARD DALE STOKLEY, Petitioner,	Cochise County No. CR-91-00284 A **MOTION FOR RECONSIDERATION AND REQUEST LEAVE TO AMEND PETITION FOR POST CONVICTION RELIEF** (assigned to Hon. Judge Borowiec)

Petitioner, RICHARD DALE STOKLEY, by and through his attorney undersigned, hereby respectfully requests this Court to grant his Motion for Reconsideration of this Court's denial of Petitioner's Petition for Post Conviction Relief and grant Leave to Amend that Petition on the grounds and for the reasons set forth in the attached Memorandum of Points and Authorities.

This request is made pursuant to *Rule 32.9* and *Rule 32.6* of the *Arizona Rules of Criminal Procedure.*

.....

4/15/97

RESPECTFULLY SUBMITTED this 15 day of April, 1997

LAW OFFICE OF CARLA G. RYAN

By Carla G Ryan
Carla G. Ryan
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS AND PROCEDURAL HISTORY.

A. Facts of the case.

On the Fourth of July weekend, 1991, a community celebration was held near the rural town of Elfrida in southeastern Arizona. Petitioner was at the celebration, performing as a stuntman in an "Old West" reenactment. Numerous local children camped out at the celebration site on July 7, 1991. Among them were Mary Snyder and Mandy Meyers, both thirteen year old girls.

The teenagers who camped out were separated by gender at bedtime. During the evening, Randy Brazeal, the co-defendant, was seen at the girls' tent having a conversation with Mary and Mandy. Brazeal, age twenty, had dated Mandy's older sister and therefore knew Mandy. The teenagers told a friend they were going to the restroom.

Around 1:00 a.m. on July 8, 1991, Mary and Mandy were seen standing next to Brazeal's car. They were then seen entering the car: Brazeal was driving and Petitioner was in the passenger seat. The girls got into the back seat.

Later that same morning Brazeal turned himself into the Chandler Police Department and confessed his "version" of the events that took place several hours before. He stated that he and Petitioner had sexual intercourse with Mary and Mandy and that they had killed the two girls.[1]

The Brazeal confession lead to the arrest, that same day, of Petitioner at a truck

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[1] Brazeal's and Petitioner's "versions" are quite difference. Brazeal indicated Petitioner had sex with both girls; that he sat in the front seat of the vehicle and smoked while Petitioner raped and killed both girls; that he was too scared to do anything; and that he helped dispose of the bodies. At trial evidence was presented that proved Brazeal lied.

stop in Benson, Arizona. Detective Rothrock and Detective Bunnell of the Cochise County Sheriff's Department conducted a taped interview of Petitioner. During the course of the interview, Petitioner made a full confession. Petitioner stated that he had had sex with the "brown haired girl" (Mandy), but denied raping her. Petitioner also stated that Brazeal had been a willing and equal participant, having had sex with both of the girls and killing one. Petitioner then cooperated with the police and lead them to the crime scene. Because of Petitioner's assistance, search and rescue teams recovered the bodies of the two girls from an abandoned, muddy mine shaft. Autopsies were performed by the Cochise County Medical Examiner, Dr. Guery Flores. Biological samples were taken from the victims, as well as from Brazeal and Petitioner. The autopsies showed that the cause of death of both girls was manual strangulation. The autopsies further showed that each girl was sexually assaulted and stabbed in the right eye. A semen sample was taken from the body of Mandy. DNA analysis indicated that both Brazeal and Petitioner had intercourse with Mandy. Mary's body cavities were filled with mud from the mine shaft, making DNA analysis impossible.

Brazeal was offered a plea to Second Degree Murder, which he accepted, with a maximum sentence of twenty (20) years. Because of the community outrage, resulting from Brazeal's plea, Petitioner was not offered a plea and was forced to proceed to trial on First Degree Murder charges carrying two potential death sentences.

B. Procedural History.

On March 27, 1992 Petitioner was convicted by a jury of two counts of Kidnapping a Minor, one count of Sexual Conduct with a Minor and two counts of First Degree Murder. The State and Petitioner stipulated to a 69 year sentence on the non-capital charges. The Trial Court sentenced Petitioner to death for each of the First Degree Murder counts.

A timely Notice of Appeal[2] was automatically filed by the Clerk of the Superior Court and appellate counsel was appointed to handle Petitioner's direct appeal. After the direct appeal briefs were filed and oral arguments were held on December 1, 1994, the Arizona Supreme Court affirmed Petitioner's conviction and sentence on June 27, 1995.

After a Petition for a Writ of Certiorari was denied by the United States Supreme Court on January 16, 1996, the Arizona Supreme Court issued their Mandate and automatically filed a Notice of Post Conviction Relief on January 26, 1996, pursuant to Rule 32 of the *Arizona Rules of Criminal Procedure*.

On April 17, 1996, Harriette Levitt was appointed by Cochise County to represent Petitioner "in all further appeal proceedings", presumably his Rule 32 or Petition for Post Conviction Relief, a state habeas proceeding. (Exhibit A). On September 27, 1996, Levitt filed a late Motion to Extend the Deadline for Filing a Rule 32 Petition for 60 days. (Exhibit B). The Petition was originally due August 17, 1996 and pursuant to that Motion this Court extended the deadline to December 2, 1996. *Id.* On November 7, 1996, Levitt filed a second Motion to Extend the Deadline for Filing a Rule 32 Petition for an additional 60 days. (Exhibit C). This Court granted that request and extended the Deadline to January 8, 1997. *Id.*

On January 8, 1997 Petitioner's Petition for Post Conviction Relief was finally filed.[3] On March 6, 1997 that Petition was summarily denied by this Court. (Exhibit D). On March 12, 1997, after Petitioner's Post Conviction counsel requested to withdraw, citing irreconcilable differences between her and Petitioner, this Court appointed undersigned to represent Petitioner "for the completion of his Rule 32 petition". (Exhibit E).

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[2] The appeal was mandatory because this is a capital case. *A.R.S.* § 13-703.

On March 18, 1997 undersigned filed a Request for Extension to File a Motion for Reconsideration. Because undersigned had to reply to Motions from the State Opposing her appointment, the appointment of co-counsel and an attempt by the State to dictate the pleadings undersigned could file, undersigned needed to file a second Request for an Extension to File a Motion for Reconsideration on April 2, 1997, requesting to extend the due date to April 15, 1997. No ruling on these pending motions has been received.

II. ARGUMENT

A. This Court should reconsider its denial of Petitioner's Petition for Post Conviction Relief because Petitioner received ineffective assistance of counsel on his original petition.

The right to effective assistance of counsel is violated if counsel's performance was deficient and if that deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Nash*, 143 Ariz. 392, 694 P2d. 222 (1985).

1. Post conviction counsel's performance was deficient.

Petitioner's post conviction counsel filed a Petition for Post Conviction Relief, after two (2) extensions[4], that consisted of a little over 3 pages of legal argument and raised only two issues. However, Petitioner expressed his concerns to Levitt after he received a copy of the untimely first Motion to Extend the Deadline for Filing a Rule 32 Petition. Levitt wrote Petitioner claiming that she had spent "quite a bit of time working on [his] case, but was forced to put it down in favor of another case which had a non-extendible deadline." (Exhibit F). Interestingly, this letter is dated October 4, 1996 and in her second Motion to Extend the Deadline to File a Rule 32, Levitt indicated that she did not receive the trial transcripts until October 31, 1996. (Exhibit C). Also, in that same Motion, Levitt

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[3] That Petition consisted of seven pages- only 3½ pages of legal arguments.
[4] The first request was filed over 40 days after the Petition's due date had passed.

stated that she would be out of the office from November 15, 1996 through December 2, 1996. *Id.*

In preparation for Petitioner's Petition for Post Conviction Relief, Levitt only spoke with Petitioner once over the telephone and never visited him. It does not appear from a review of the file that she ever conducted an investigation or requested funds for experts or investigators to assist her.

Upon receipt of the Petition for Post Conviction Relief, Petitioner panicked. In desperation, Petitioner wrote Denise Young at the Arizona Capital Representation Project and also wrote this Court. (Exhibits G and H). These letters were written and mailed **before** this Court made a decision or even before an opposition was filed by the State[5]. Although, this Court indicated it did not read the letter from Petitioner, the letter stated in part:

> The Rule 32 filed by Ms. Levitt is a disgrace, and a good example of the very "ineffective assistance of counsel" which it is meant to relieve. **I must ask this Court to stop this Rule 32 petition and appoint an attorney who will apply his or her self and try to do a competent job in this matter.** I feel very strongly that my constitutional rights have been violated and I humbly request that the Court do what is necessary to correct this problem.

(Exhibit H). (emphasis added).

Petitioner is entitled to effective representation at his post conviction proceeding just as he is at trial, sentencing and on appeal. In *State v. Krum*[6] 182 Ariz. 108, 893 P.2d

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[5] These letters suggested the lack of substance in the Petition and suggested other issues that needed to be raised.

[6] This case was later vacated on other grounds by the Arizona Supreme Court in *State v. Krum*, 183 Ariz. 288, 903 P.2d 596 (1995). This part of the Court of Appeals decision was not discussed and therefore not overruled.

759 (Ariz. App. 1995), the Court of Appeals held that "for the right to counsel to be meaningful, it must encompass effective assistance of counsel." *citing*, *Strickland v. Washington*,466 U.S. 668, 104 S.Ct. 2052 (1984), which has been adopted in Arizona as the standard for effective assistance of counsel. *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985). This is especially true in capital cases where, post conviction proceedings are critical, *Murray v. Giarratano*, 492 U.S. 1 (1989), and in states, such as Arizona, where procedural rules default claims not discovered or presented in these proceedings. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991). *See also*, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline *11.9.3*[7].

Not only is Petitioner afforded the right to effective assistance of counsel through the United States Constitution[8], but also the Arizona Legislature has recently proclaimed their approval as well. *A.R.S § 13-4041(B)* sets forth the qualifications needed for counsel representing a capital defendant in post conviction proceedings[9] that counsel:

1. Has been a member in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.

2. Has practiced in the area of state criminal appeals or post-conviction for at least three years immediately preceding the appointment.

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[7] Additionally, Petitioner's statutorily-mandated post conviction proceeding was the first opportunity where he could raise a claim of ineffective assistance of trial counsel and appellate counsel. Therefore, the denial of effective post conviction counsel, at this first opportunity, violated his due process rights. *See Coleman*, at 2567.

[8] The Ninth Circuit Court of Appeals held in *Bonin v. Vasquez*, 999 F2d 425, 429 (1993), that the right to Due Process of Law under the United States Constitution included the right to effective assistance of counsel in post conviction proceedings in some complex cases.

[9] Undersigned does not concede that because of *A.R.S. § 13-4041* Arizona is an opt-in state for the purposes of federal review.

> 3. Did not previously represent the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation.

Furthermore, *A.R.S. § 13-4041(C)* states in part:

> The supreme court [Arizona] may refuse to certify... or may remove an attorney from the list who meets the qualifications established under subsection B of this section if the supreme court determines that the attorney is incapable or unable to adequately represent a capital defendant.

Also, the *Arizona Rules of Criminal Procedure* have been amended to include **parallel standards for appointment of counsel in capital cases**, which includes standards for appellate and post conviction counsel. *Rule 6.8(c)*. The comment to that new *Rule of Criminal Procedure* states:

> The purpose of this rule is to establish standards for appointment of counsel **at all stages of capital litigation**.

(emphasis added).

Assuming arguendo, that there was no right to effective assistance of counsel at the post conviction stage before the new rules and statutes;[10] these new statutes now require effective assistance of counsel.

Furthermore, Petitioner was sentenced to death. The potential severity of the punishment is a factor to be evaluated in determining whether counsel's performance was reasonable under the circumstances. *United States v. Cronic*, 466 U.S. 648 (1984); *Strickland, supra.*

A national study has concluded that the median hours spent by a competent

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[10] *State v. Mata*, 916 P.2d 1035 (May 9, 1996).

attorney during a capital post conviction case is 582 hours. ABA, Standing Committee on Legal Aid and Indigent Defense Bar Information (Prepared by The Spangenberg Group). "Time and Expense Analysis in Post-Conviction Death Penalty Cases," (Feb. 1987). And, the Eighth Circuit noted that the "average time that a competent lawyer labors in post conviction review of a single death sentence is approximately one-quarter of a lawyer's billable hours for a year." *Mercer v. Armontrout*, 864 F.2d 1429, 1433 (8th Cir. 1988).

These studies concluded that the role of post conviction counsel for a capital defendant is far different from other appointed counsel. Post conviction counsel must obtain and thoroughly review the entire record and files of the trial and appellate counsel, consult with the client and trial and appellate counsel, and undertake an investigation to determine whether there is any basis outside of the record which entitles Petitioner to relief from the conviction or sentence. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.9 and Commentary.

Where a co-defendant is involved, as is here, the co-defendant's records must also be obtained and reviewed and parties involved in that case must be interviewed for potential issues. Thus, proper representation on post conviction requires a thorough factual investigation of all aspects of the trial and appeal. *See*, Liebman, J., Federal Habeas Corpus Practice and Procedure, §7.1, (discussing need for "comprehensive profiling and pretrial documentary, field and legal investigation to identify and prepare to litigate the appropriate causes of action..."). See also, *Sanders v. Ratelle*, 21 F3d. 1446 (9th Cir. 1994); *A.R.S. § 13-4013.*

A quick perusal of the record in this case confirms that prior counsel did not perform competently. Because of her failure to undertake a new, independent investigation she was not in a position to make an informed, competent decision as to

what issues needed to be raised in the Rule 32 Petition, nor could she determine whether there was any basis outside of the record which would entitle Petitioner to relief from the conviction or sentence of death.

Undersigned has already received information indicating numerous head injuries that need to be investigated and evaluated to determine whether they may have been a causal connection to Petitioner's behavior or whether these injuries may explain, even though not justify, why these two murders occurred. *State v. Murray*, 784 Ariz. 9, 906 P2d., 542 (1995). In fact, Petitioner had brain surgery in 1981 in a San Antonio Hospital and in 1986 he was involved in a pedestrian (Petitioner was the pedestrian) - car accident in Sierra Vista, Arizona, which left him hospitalized.

Additionally, Petitioner never knew his biological father, was originally raised by a step-father and his mother, but was shuffled off to his Aunt and Uncle when he was about 14. None of this family history has been gathered and evaluated to determine whether it could have had any effect on Petitioner's ability to understand or control his behavior. *State v. Eastlack*, Pima County Superior Court No. CR-28677. (Mitigation hearing held February 25-28, 1997; life sentence pronounced on April 11, 1997).

Additional time and funds will be necessary to determine any other information outside of the present record which needs to be (and was not) presented in the Petition for Post Conviction Relief. *A.R.S.* § 13-4013. The United States Supreme Court has held that investigators, mental health professionals, forensic professionals, and other experts are essential in capital cases. *Ake v. Oklahoma*, 470 U.S. 68 (1985). See also, *A.R.S.* § 13-4013.

Undersigned has tentatively identified the following potential issues that may be

raised if this Court grants leave to amend Petitioner's Petition for Post Conviction Relief:[11]

a. Ineffective assistance of counsel at trial because counsel failed to thoroughly challenge the fact that some members of Petitioner's jury had signed a petition so that Petitioner would not be offered a plea.

b. Ineffective assistance of counsel at trial because counsel failed to object to the death qualification of the jurors or to try to rehabilitate the jurors after they were death qualified.

c. Ineffective assistance of counsel at trial because counsel failed to strike the "rehabilitated juror" after the death qualification of the jurors.

d. Ineffective assistance of counsel at trial because counsel failed to obtain other copies or investigate Petitioner's confession and the rumor that there were two different versions of that confession.

e. Ineffective assistance of counsel at trial because counsel failed to object to the substance of the confession that was played in court; a tape that was so inaudible that the transcript had to be read instead.

f. Ineffective assistance of counsel at trial because counsel failed to object to the introduction of gruesome autopsy photographs.

g. Ineffective assistance of counsel at trial because counsel failed to make an offer of proof that Petitioner was a scapegoat for this crime, after the community outrage at the plea bargain of the co-defendant.[12]

h. Ineffective assistance of counsel at sentencing because counsel failed to do a Genogram of Petitioner's biological family tree.

i. Ineffective assistance of counsel at sentencing, because counsel stipulated to sealing the presentence report where this report should have been used to

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[11] This list is not exhaustive. Undersigned has not had an opportunity to do a full investigation, other issues may need to be raised.

[12] After Brazeal was offered a plea, a petition was circulated to force Petitioner to go to trial. Brazeal moved to withdraw his plea and that motion was denied by this Court, even after Brazeal refused to testify at the trial and he was held in contempt. At that time, there was evidence that had surfaced during Petitioner's trial as to the actual participation of the co-defendant that differed extensively from Brazeal's original statements. The County Attorney's Office did not object to Brazeal's Motion to Withdraw the Plea and proceed to trial, but this Court denied Brazeal's motion anyway.

failed to do a Genogram of Petitioner's biological family tree.

i. Ineffective assistance of counsel at sentencing, because counsel stipulated to sealing the presentence report where this report should have been used to prove the statutory mitigating factor that Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to the prosecution. *A.R.S.* §13-703.

j. Ineffective assistance of counsel at sentencing because counsel failed to do a full and complete family history which would have established both statutory and non-statutory mitigation, including, but not limited to: emotional abuse, physical abuse, effects of a strict religious upbringing, chaotic childhood, why petitioner lived with an aunt and uncle for part of his childhood, preferential treatment of sister by her natural father (Petitioners step-father) lack of paternal affection, lack of maternal affection, effects of never knowing his biological father, potential character, neurological and medical disorders not diagnosed and therefore not treated, potential to be rehabilitated and not to be a threat to society when limited to a structured environment.

k. Ineffective assistance of counsel at sentencing because counsel stipulated to sealing the pre-sentence report where this report should have been used to prove the non-statutory mitigating factors of dysfunctional family, child abuse, neglect, religious extremism during childhood and preteens and severe alcoholism.

l. Ineffective assistance of counsel at sentencing because counsel failed to thoroughly investigate Petitioner's mental health history, including but not limited to head injuries and severe alcoholism.

m. Ineffective assistance of counsel at sentencing because counsel failed to have Dr. Mayron complete the Neuropsychological examination that was initiated.[13]

n. Ineffective assistance of counsel at sentencing because counsel failed to make a causal connection between Petitioner's mental health history and the murders.

o. Ineffective assistance of counsel at sentencing because counsel failed to interview witnesses who could have corroborated a head injury that occurred just a few months before the crime.

p. Ineffective assistance of counsel at sentencing because counsel failed to challenge Petitioner's ex-wives' bias testimony.

q. Ineffective assistance of counsel on appeal because counsel failed to demonstrate that Petitioner was prejudiced by the pre-trial publicity surrounding the murders.

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[13] Apparently Dr. Mayron only spent about 20 minutes with Petitioner. No battery of neurological tests were completed. No evaluation was developed.

r. Ineffective assistance of counsel on appeal, because counsel failed to challenge two of the three aggravating factors.

s. Cost of execution is a mitigating factor and should be considered by the trial court.

t. Petitioner's sentence is disporotionate to the penalty imposed to his co-defendant.

u. This court should conduct a proportionality review in order to determine whether Petitioner's sentence is proportionate to the penalty imposed in similar cases.

v. There is a potential for double counting when a court finds, as in this case, multiple homicides as an aggravating factor and that the murders were cruel, heinous, or depraved, because one victim had to watch while the other victim was murdered.

w. Arizona's death penalty statute is arbitrarily and capriciously imposed since the guidelines for seeking the death penalty vary from county to county (and in some cases the County Attorney's Office does not have any guidelines to follow), in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

x. The prosecutor's unfettered discretion in seeking the death penalty violates the Eighth Amendment to the United States Constitution.

y. Arizona's imposition of death by gas is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and the Arizona Constitution. Article Two, Sections One, Four and Twenty-Four.

z. Arizona's imposition of death by lethal injection is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and the Arizona Constitution, Article Two, Section One, Four and Twenty-Four.

AA. The American Bar Association has issued a Resolution calling for a Moratorium abolishing the death penalty because it is unfairly imposed.

BB. The major religions of the world call for the abolition of the death penalty.

CC. The death penalty is not a deterrent to other murders.

DD. The disproportion value of the quality of life while on death row verses a life sentence is a mitigating factor.

Levitt further failed to petition this Court for funds for an investigator and/or experts

to assist her in the preparation of this Petition. A defense attorney can not make an informed, intelligent, tactical decision without the tools being available for a full investigation. *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994).

Therefore, this Court should allow Petitioner to amend his Petition in order to properly use the Rule 32 proceeding as it is suppose to function - as a full review of the record and information outside of the record. A denial of this request will deny Petitioner his right to a state habeas proceeding that is anything more than a sham and a farce.

2. Post Conviction counsel's deficient performance prejudiced Petitioner.

The prejudice prong of the *Strickland* test is met by demonstrating a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different."[14] *Supra* at 694. A "reasonable probability" is not outcome determinative, but is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* at 693-694. The prejudice prong is directed to the question whether the proceeding was **fundamentally unfair**. *Lockhard v. Fretwell*, 113 S.Ct. 838 (1993). The prejudice prong is objective. *Strickland, supra*.

As indicated in section 1, *supra*, the substance of the Petition is deficient. Not only does Levitt misstate the law,[15] but she raised only two fairly minor issues, when

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[14] By result, the courts had said they mean not only a conviction, but a life verses a death sentence.

[15] On p. 4 of. Levitt's Petition she states that "[u]nder this standard our courts have held that whether defense counsel showed minimal competence depends on whether his acts or omissions are a crucial part of the defense." In actuality whether defense counsel's acts or omissions are a crucial part of the defense goes the second prong of the *Strickland* test, prejudice, and not to the first prong, whether counsel's performance was deficient or failed to meet at least the minimum

others appear to have merit and failed to perform any additional investigation. Individually and/or cumulatively these issues would have changed the outcome in this case.

The Courts have held that neurological, as well as medical, explanations for a defendant's behavior can be used to mitigate the sentence if the conditions are connected to the offense. *State v. Bible*, 175 Ariz. 549, 606, 858 P2d. 1152, 1209 (1993). If there is mitigation present that was not raised, then this Court needs to re-weigh it against the aggravators to determine if it requires lenience. Therefore, Petitioner was prejudiced by Levitt's failure to perform her duties and present any additional mitigation.

B. This Court erred in finding that Petitioner's claim of ineffective assistance of counsel, based on trial counsel's failure to object to the jury panel and thereby failing to preserve this issue for appeal, was precluded and waived.

One of the two issues Levitt raised was that trial counsel was ineffective in failing to preserve for appeal this Court's denial of Petitioner's Motion for Change of Venue. This Court found that this claim was precluded citing *Rule 32.2* of the *Arizona Rules of Criminal Procedure*. (Exhibit D). In its minute entry this Court stated that the denial of venue was considered extensively by the Supreme Court [on direct appeal] and that the issue of ineffective assistance of counsel with regards to the Motion for Change of Venue was "tacitly dealt with" and therefore adjudicated on appeal and precluded under *Rule 32.2*. *Id.*

The Arizona Supreme Court's opinion does not mention or allude in any way to a potential claim of ineffective assistance of counsel regarding this issue. (Exhibit I). The opinion states:

> Because defendant made no effort to show actual prejudice of the jury at the time of trial and because our examination of the

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standards in the community.

> voir dire fails to show such prejudice, we consider whether the pretrial motion demonstrated a situation in which prejudice should be presumed.

This does not constitute "[f]inally adjudicated on the merits on appeal" pursuant to *Rule 32.2*. The Arizona Supreme Court did not address the merits of an ineffective claim regarding this issue. This Court's minute entry further stated that this issue was "adjudicated on appeal, and certainly waived both on trial and appeal." (Exhibit D). However, an issue can not be both adjudicated and waived.

Since this is an ineffective assistance of counsel claim, this issue could not have been raised on direct appeal. The Arizona Supreme Court has ordered that a claim of ineffective assistance of counsel will not be reviewed for the first time on direct appeal but **must** be raised in a Petition for Post Conviction Relief. *State v. Carver*, 160 Ariz. 167, 771 P.2d 1382 (1989) (emphasis added).

Finally, this claim is not waived because it falls within the scope of viable issues that can be raised in a Petition for Post Conviction Relief pursuant to *Rule 32.1(a)* of the *Arizona Rules of Criminal Procedure*. "[A]n allegation of ineffective assistance of counsel is encompassed within Rule 32.1 as a claim that a defendant's conviction or... sentence was in violation of the Constitution of the United States or the State of Arizona'." *State v. Herrera*, 183 Ariz. 642, 905 P.2d 1377 (App. 1995).

C. <u>This Court erred in finding that Petitioner's claim that the State Suppressed Brady Material, regarding co-defendant's satanic cult affiliations, if discovered, would not have altered the verdict.</u>

Although this Court found this evidence newly discovered, it found that it "would not have altered the verdict." (Exhibit D). However, the standard under *Rule 32.1(e)* of the *Arizona Rules of Criminal Procedure* is whether the newly discovered evidence

"would have changed the verdict **or the sentence**". (Emphasis added).

If the fact that Brazeal was involved in a satanic cult would have been disclosed at the trial or at least prior to or during the aggravation/mitigation hearing, trial counsel could have used this information to mitigate the death sentence that was imposed on Petitioner.

At sentencing a trial court must consider any aspect of a defendant's character or record and any circumstances of the offense relevant to determining whether the death penalty should be imposed. A.R.S. § 13-703; *State v. Kiles*, 175 Ariz. 358, 857 P2d. 1212 (1993).

The co-defendant's satanic cult involvement supports a finding that he, and not Petitioner, was the major participant in these murders and that the co-defendant was the "evil " one, who manipulated or controlled Petitioner. *Clabourne v. Lewis*, 69 F2d. 1373 (9th Cir. 1995). It is relevant to Petitioner's, as well as the co-defendants state of mind.

Minimally, the co-defendant's involvement in these types of rituals was also relevant to the manner of death and could have supported the *A.R.S. § 13-703 (G) (4)* mitigator that Petitioner's involvement was relatively minor when compared to the co-defendant's. [This issue was raised in the direct appeal, but the co-defendant's satanic cult involvement was never disclosed to Petitioner and therefore not available as support for the (G) (4) mitigator].

If this had been disclosed and further investigated the sentence or conviction may have been different.

D. Petitioner has good cause pursuant to *Rule 32.6(d)* to Amend Petition for Post Conviction Relief.

As stated above, Levitt provided ineffective representation to Petitioner in the

> instructs the court to make final adjudication of **all** the petitioner's claims-- those lurking in the background as well as those specified. For this reason, section (d) provides for a liberal policy toward amendments to the pleadings.

(emphasis added). Additionally, the federal courts have consistently requested that these proceedings be completed not piece-meal, but in an effective, competent manner. *French v. United States*, 416 F.2d 1149 (1969).

The above enumerated issues are set forth for this Court as proof of good cause why the denial of the Petition should be reconsidered and why this Court should allow the Petitioner to Amend the Original Petition. [see Argument A (1)] Petitioner is not requesting that this Court make a determination on the merits of those issues at this time, since they have not been fully developed or investigated. It would be ineffective *per se* to suggest these issues are adequately presented before this Court for the purpose of a determination on the merits. Afterall, Petitioner has not been allowed funds for the necessary experts and an investigator, which will be necessary to adequately present these issues.

E. <u>This Court should have held a *Bland* hearing before summarily dismissing the Petition for Post Conviction Relief.</u>

As indicated, Petitioner wrote to this Court and to the Arizona Capital Representation Project as soon as Levitt filed the Petition. (Exhibits G and H). At that time he indicated his concerns about prior counsel. This letter was received prior to the Court summarily dismissing the Petition; therefore, Petitioner timely raised and preserved his objections to Levitt's Rule 32 and his request to amend that Petition, as well as his Request for Substitute Counsel.

Once a request for substitute counsel is made a hearing should be held. *Bland v. California Department of Corrections*, 20 R3d. 1469 (9th Cir. 1994). Even if this Court

didn't read the letter from Petitioner, this Court did forward it to Levitt. Levitt should have immediately requested a *Bland* hearing. This should have been done prior to this Court issuing its summary denial of the Petition for Post Conviction Relief.

The State in its Motion asserts that Petitioner does not have a right to a "meaningful relationship" with his attorney and that "a complete breakdown of the attorney-client relationship" is no reason to withdraw as counsel. Although it is true that there is no guarantee to a "meaningful relationship", if there is a total breakdown in the attorney-client relationship, the court would [be] required to dismiss counsel and appoint another attorney." *United States v. Wadsworth*, 830 F.2d 1500 (9th Cir. 1987).

The State asserts that Levitt is an experienced attorney[16]; however, the focus of a conflict between an attorney and a client is not whether counsel is legally competent, but the relationship itself. *United States v. Walker*, 915 F2d 480 (9th Cir. 1990); *Bland v. Calif. Dept. of Corrections*, 20 F.3d 1469 (9th Cir. 1994).

"[W]hen [a] defendant requests substitute counsel, [the] court should make [a] formal inquiry into the defendant's reasons for [h]is dissatisfaction with present counsel." *Id.* at 1476, citing *United States v. Robinson*, 913 F.2d 712, 716 (9th Cir.). As stated, Petitioner attempted to put this Court on notice before his Petition for Post Conviction Relief proceedings were completed. This Court should have made an inquiry that was adequate enough "to determine whether there was an irreconcilable conflict." *Bland* at 1476-77. This type of inquiry must be thorough. *King v. Rowland*, 977 F.2d 1354 (9th Cir. 1992). If this Court thought such an inquiry would have been awkward, this Court should

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[16] The State does not assert that Levitt is or acted competently in this case; the argument set forth by the State is that Petitioner is not entitled to effective assistance of counsel at the Post Conviction stage.

have appointed temporary counsel for Petitioner to determine the nature and extent of the conflict. *Wadesworth*, at 1510 (the District Court should have suspended the hearing on a Motion to Substitute Counsel and appoint a temporary attorney for defendant at said hearing). Minimally, this issue should have been brought to the Court's attention prior to this Court ruling on the Petition.

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant his Request to Reconsider the Summary denial of the original Petition and requests permission to Amend the Original Petition in order to avoid piece-meal litigation and to allow his Post Conviction Proceeding to be meaningful and not just a sham proceeding

RESPECTFULLY SUBMITTED this 15th day of April, 1997.

LAW OFFICE OF CARLA RYAN

Carla G. Ryan

CARLA G. RYAN
Attorney for Petitioner

Copy of the foregoing mailed/delivered
this 15 day of April, 1997, to:

The Hon. Judge Borowiec
Cochise County Superior Court
P.O. Drawer CT
Bisbee, AZ 85603

January 15, 199[illegible]

Dear Denise:

I'm writing to you because I have been "dump-trucked" on my Rule 32, and I need help in the worst way. I don't know if you remember me, but you and Michael O'Connor did my cert on Direct Appeal last year when you were at ACDP. After it was concluded I filed a Notice for Post-conviction Relief, and Ms. Harriette P. Levitt of Tucson was appointed to do my Rule 32.

She wrote me upon being appointed (#1), and shortly thereafter we spoke by phone. We discussed my case somewhat, but memory is dim on my part, and I told her so. It has been a long time (4½ yrs.)and I can't recall many details of my trial, nor do I have a transcript. I feel that she was expecting me to come up with the issues to be raised, but that was her job.

Ms. Levitt had no further contact with me until she filed the "untimely" Motion for the first 60 day extension, which was 42 days late. (#2).

I immediately wrote her expressing my alarm at the obviously negligent manner in which she was handling my case, and asked her to please not cause me to lose the opportunity to file my Rule 32.

She responded (#3), claiming that she'd been "spending quite a bit of time working on my case (even tho she did not get the transcript until October 31), but was forced to put it down in favor of another case with a non-extendable deadline".

She then filed for the second 60 days (#4), yet used only 39 of those days. All told, it looks like she used a grand total of 71 days out of the allotted 240 days, and the results are quite a joke. But this is no joking matter.

So a rushed and negligent "Rule 32 Petition" was filed January 10, 1997, and I find it a ludicrous excuse for what it should be. It consists of 2 pretty lame issues which are laid out entirely (with Memorandum of Points & Authorities,etc.) on 8 pages. Then there are about 25 pages of photocopied case law which is obviously just filler material, and then two affadavits. ← #5

That's it! In a death penalty case! About 40 pages with little substance. I would imagine the courts will make short work of that, and then I can just about kiss it goodbye.

I don't really expect a court-appointed attorney to do the kind of appeal that a paid, high-dollar lawyer would, but this is outrageous. I think you can see that for yourself.

After wasting all the time she did, this thing was rushed up. The second 60-day extension started on December 2, 1996, and won't be up until January 31,yet this was file on January 10, leaving 21 days. That's three weeks thrown away on top of all the time from April until October 31 with no transcript. It's plain that Ms. Levitt made very little effort to even familiarize herself with my case, much less did she try to do an effective appeal. I know now what "dump-trucked" means.

I know that you aren't with ACRP anymore,and that you're quite busy. I do apologize for bothering you, but I don't know who else to turn to in this grave situation.

Please give me any help or advice you can. I wonder if there isn't some way to file a motion to stop this mess and get an attorney who will care enough to do a competent job. What do you think? Is there any hope at all? I can't just let this thing go without at least trying to do something. This is like ineffective assistance of counsel in stereo.

I have not said anything to Ms. Levitt because I am really upset and I don't know what to say. And the court has had this Rule 32 since January 10. I'm sending along copies of all the documents mentioned in this letter so you can see for yourself. Forgive me for imposing, but this is a desperately important matter. If there is any help or advice you can give me, please do so. I anxiously await your reply.

Hopefully Yours,

Richard Stokley
ADC92409 Unit C35
ASPC-F
P.O. Box 8500
Florence, AZ 85232

From: Richard Dale Stokley
ADC#92408 Unit CB6
Arizona State Prison
P.O. Box 8600
Florence, AZ 85232

CASE NO.
CR91-00284A
(death Penalty)

To: The Honorable Judge Matthew Borowiec
Cochise County Superior Court

February 15, 1997

Your Honor:

In the matter of the Rule 32 Petition which has been prepared and submitted on my behalf, I am writing to express my extreme dissatisfaction and alarm at the cursory and careless manner in which it has been handled. I also implore the Court to take steps to remedy the matter as the present Petition is sorely lacking and wholly inadequate.

I feel that my attorney has handled this initial Rule 32 in a negligent manner as evident through events and the end result. The "events" which I cite are as follows:

1. On April 19, 1996 Ms. Harriette P. Levitt was appointed to handle my appeals. She wrote me on April 19, and a few days later we spoke by phone. I told her that I do not know much about legal matters, nor do I have much memory of details of my trial after all this time. But I did discuss some possible issues for my Rule 32 with her. I asked her to keep me informed, and that was the last I heard of her until September 27.

2. About September 27 I received a copy of her MOTION for a 60-day EXTENSION (not timely filed), which I realized was (I believe) 43 days late.

3. I immediately wrote her expressing my alarm at the obvious lack of attention she was giving to my case, and asked her to please not cause me to lose the opportunity to file my Rule 32.

4. On October 4, 1996 she wrote back claiming that she'd been "spending quite a bit of time working on my case, but was forced to put it down in favor of another case with a non-extendable deadline". At this point she did not even have my case file or transcripts, which, according to her MOTION for the second 60-day EXTENSION, she did not receive until October 31, 1996. Things don't add up, do they?

5. She then filed for that second 60-day extension, which I think started on December 2, 1996, which would mean that the deadline was January 31, 1997, yet she filed on January 10, thereby wasting another 21 days. Out of 240 days, it appears that she only had my files for about 71 days prior to filing.

6. On January 31, 97 I spoke with Ms. Levitt by phone, and I let her know that I am concerned and dissatisfied with her work and the brevity of this 6-page, 2 issue Rule 32. And I found what she had to say inappropriate and disturbing, to say the least. I made notes, and will relate some of it here:

I asked Ms. Levitt why the Rule 32 was so brief, and she replied that "Some are even briefer than that". She also told me that "My trial attorneys didn't make any mistakes", and that "There are no more issues that can be raised in my case". She said that "This Rule 32 won't take long in the courts, and that then my case will go into federal court where I will lose". She said that I will probably be executed in 2 or 3 years.

Given what is outlined above, I believe it evident that my present appeal has been handled with a lick and a promise, rather than being given the conscientious analysis and preparation which should be applied. As a recent article published by the Arizona State Bar in the February 1997 issue of its magazine, ARIZONA ATTORNEY, titled "New Rules on Indigent Representation" by Larry Hammond and John Stookey notes:

> For counsel to represent adequately a defendant sentenced to death in a **first post-conviction proceeding**, counsel must review every document, item of evidence, transcript and order in the case, beginning with the earliest police report and ending with the last order entered by the Arizona Supreme Court. Counsel must carefully investigate every possible issue, including the possibility of ineffective assistance of counsel at both guilt and penalty phases of the trial, as well as on direct appeal.

Id at p. 30.

The Rule 32 prepared by Ms. Levitt is a disgrace, and a good example of the very "ineffective assistance of counsel" which it is meant to relieve. I must ask the Court to stop this Rule 32 petition and appoint an attorney who will apply his or her self and try to do a competent job in this matter. I feel very strongly that my constitutional rights have been violated and I humbly request that the Court do what is necessary to correct this problem.

I am enclosing copies of the documents mentioned herein for the convenience of the Court. PLEASE RESPOND TO THIS LETTER AS SOON AS POSSIBLE.

Very Humbly,Yours,

Richard Dale Stokley

Richard Dale Stokley

cc/file

LAW OFFICE OF CARLA G. RYAN
6987 North Oracle Road
Tucson, Arizona 85704
(520) 297-1113
State Bar Nos: 004254/017357
Attorneys for Petitioner

FILED

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

RECEIVED
APR 02 1997

THE STATE OF ARIZONA, Respondent, vs. RICHARD DALE STOKLEY, Petitioner.	Cochise County No. CR-9100284A **REPLY TO OPPOSITION TO MOTION TO APPOINT CO-COUNSEL** (Judge Borowiec)

Petitioner, RICHARD DALE STOKLEY, by and through his attorney undersigned, hereby respectfully requests this Court to grant his Request to Have Co-Counsel Appointed on the grounds and for the reasons set forth in the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 31st day of March, 1997

LAW OFFICE OF CARLA G. RYAN

By for Carla G. Ryan
Attorney for Petitioner

...

3/31/97

MEMORANDUM OF POINTS AND AUTHORITIES

A. FACTS.

On March 18, 1997 undersigned filed a Request to Have Co-Counsel Appointed (hereinafter "Request"). In response to that Request, the Assistant Attorney General, Eric Olsson, filed an Opposition to Motion to Appoint Co-Counsel (hereinafter "Opposition"). Within that same Opposition, Olsson urges this Court not only to deny Petitioner's Request but, in an extremely unprofessional and highly questionable manner, demands this Court to have undersigned "off the case" and "reinstate Ms. Levitt.[1]" Opposition p. 3.

B. ARGUMENT.

1. **The State has no standing to oppose this Court's appointment of Counsel or Co-Counsel.**

As stated in Petitioner's Reply to Motion to Vacate Dismissal of Counsel, or Alternatively, to Clarify Role of Substituted Counsel, "the State has no standing to petition this Court, or any other Court, regarding the appointment of counsel" or co-counsel[2].

Allowing the Office of the Attorney General to take a position on the appointment of counsel, or co-counsel, would violate the basic principles of the adversary system and would be a clear conflict of interest. State v. Knapp 111 Ariz.

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[1]. Olsson in his heated opposition seems to ignore the "finality of this Court's order..." allowing Ms. Levitt to withdraw and appointing undersigned. Opposition p.2

[2]. This is a clear example as to why the Arizona Supreme Court should revisit it's decision in State v. Apelt, Wherein they eliminated ex parte motions. Obviously, the prosecutors in Arizona can not be trusted to use their discretion properly.
These meritless motions dealing with appointment of counsel only increased the costs and time involved in litigating this capital case.

107, 523 P.2d 1308 (1974); State v. Madrid, 105 Ariz. 534, 468 P.2d 561 (1970). Olsson does not cite any authority that allows the prosecutor to object to the association of counsel or to even have any say in such an appointment. All of the Rules relating to the appointment of counsel **only** refer to the Court's duties. Rules 6.5, 6.8 and 32.4(c), Arizona Rules of Criminal Procedure; A.R.S. Section 13-4041.

Olsson's interference, on its face, violates Petitioner's right to a fair trial, counsel and to present his case to the Courts. United States Constitution, Amendments 5, 6 and 14; Arizona Constitution, Art. 2 Sections 22, 24 and 25. It also interferes with Petitioner's attorney-client privilege, E.R. 1.6., and causes undersigned to potentially be ineffective because she has to defend herself, as well as her client. This violates a prosecutor's duties and ethics. E.R. 3.8(b), Rule 42, Rules of the Supreme Court, Professional Conduct. A prosecutor has the responsibility of a minister of justice and not just simply that of an advocate; this responsibility carries with it specific obligations to see that a defendant is accorded justice. State v. Noriega, 142 Ariz. 474, 690 P.2d 775 (1984); State v. Fisher, 141 Ariz. 227, 686 P.2d 750 (1984).

Even, if this underhanded and mean-spirited attack on undersigned is not an ethical violation, it is unprofessional and smacks of impropriety. The prosecution should not be able to succeed on cases because they get to "pick" who they will practice against in a court of law!

This is suppose to be an **adversarial** process not a prosecution's game, where they make up the rules and only play against the team they choose. The adversary system is based upon the competitive presentation of the evidence to the Court. In order to achieve justice in any case the competition must be fair. E.R. 3.4.

Olsson is the only attorney filing frivolous, meritless motions costing the

taxpayers money and causing undersigned to delay her review of the file[3], which is necessary to prepare either a Motion for Rehearing or a Petition for Review [which are **both** allowed by the Rules of Criminal Procedure, Rule 32.9(a) and (c)] or, if deemed necessary by undersigned, to Request to Amend the Petition for Post Conviction Relief. Rule 32.6(d), Arizona Rules of Criminal Procedure.

"A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, **other lawyers** and public officials." Preamble to the Arizona Rules of Professional Conduct- A lawyer's responsibilities. (emphasis added).

2. **The appointment of Co-Counsel is critical in this case[4].**

It is clear that capital cases are different. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1993 (1977). Because of the finality of the death sentence, the United States Supreme Court has consistently held capital cases to a different standard. Id. Afterall, "there is a significant constitutional difference between the death penalty and lesser punishments..." Murray v. Giarrantano, 492 U.S. 1 (1989). Because of this distinction, there is a presumption in many jurisdictions that second counsel is required in all capital cases. Keenan v. Superior Court, 31 Cal. 3d 424, 180 Cal.Rptr. 489 (1982).

Olsson states that other than the fact that this is a capital case, (a major factor) this is not an extraordinary case. In support of his argument he cites State

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[3]. It will probably be Olsson who will object to any continuances, even though he is the one responsible for wasting precious resources and time.

[4]. Although it is Petitioner's position that the State does not have standing to object to this Court's ruling, Petitioner does not want to waive any issues; therefore, he will address the merits of the State's Motion; however, he does not concede his position that the State has no standing to oppose this issue.

v. Bolton, 182 Ariz. 290, 299, 896 P.2d 830, 839 (1995) and paraphrases "[this] capital case had no extraordinary circumstances warranting extra briefing."

In that case defense counsel requested leave to file a 175 page opening brief. Id. The Arizona Supreme Court denied that request stating that the allotted page limit was reasonable for a capital case. Id. The Court pointed out that because other capital cases were adequately briefed in that page limit. Id. The opinion went on to indicate that unless extraordinary circumstances could be shown **in comparison to other capital cases** the page limit was reasonable for that defendant. Id. Olsson has attempted to mislead this Court by insinuating that the Arizona Supreme Court found that capital cases are not extraordinary[5]. However, that is not an accurate reading of Bolton, supra.

In fact the United States Supreme Court stated in Gardner, supra, that "because life is at stake, the courts **must** be particularly sensitive to ensure that every safeguard designed to guarantee a defendant a full defense be observed." (emphasis added). Furthermore, the United States Supreme Court has repeatedly emphasized that **extraordinary measures are required** to insure the reliability of a death sentence. Woodson v. North Carolina, 428 U.S. 280 (1976); Ford v. Wainwright, 477 U.S. 399 (1986); Caldwell v. Mississippi, 472 U.S. 320 (1985); Gardner, supra.

Therefore, the United States Supreme Court, the Ninth Circuit Court of Appeals and the Arizona Supreme Court have all consistently recognized the complexity of capital cases. State v. Walton, 159 Ariz. 571, 769 P.2d 1017 (1989)(complex issues are presented by death penalty cases); Bloom v. Calderon, 72 F.3d 109 (9th Cir. 1995)(death penalty cases are more complex and require far

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[5]. This by itself may be a violation of the code of ethics. E.R. 3.3(a)(1).

more time to prepare than ordinary cases); Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994)(representing an individual who is accused of a capital offense is the most demanding, complex, and weighty responsibility in the entire legal profession); United States v. Kennedy, 618 F.2d 557 (9th Cir. 1980)(death penalty cases are more complex and difficult to try).

In fact, in the January 8, 1997 issue of the Arizona Journal, Chief Justice Zlaket emphasizes the enormity of the decision in these cases:

> Deciding who should die and who should live is a **very complex** process that we [the Arizona Supreme Court] all take quite seriously.
>
> It's also an area in which there seems to be little relief in sight.

(emphasis added). Exhibit A.

At the local level, the Cochise County Legal Defender's Office and the Cochise County Public Defender's Office policy is to appoint two attorneys in capital cases. Exhibit B. This is also true of the Pima County Legal Defender's Office, the Pima County Public Defender's Office, Coconino County Public Defender's Office and Maricopa County Public Defender's Office. Id. Moreover, the Arizona Supreme Court has proposed amending Rule 6.8 to include that two attorneys must be appointed in all capital cases.

Even before our Supreme Court adopted this policy, both the National Legal Aid and Defender Association (NLADA) and the American Bar Association (ABA) came forward with their recommendations that two attorneys should be appointed at **all** stages of capital cases. Exhibit C.

The ABA has gone even further. On February 3, 1997 they released a strong Resolution which demands a moratorium. They:

> [C]all[] upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies that are consistent with the

> following longstanding American Bar Association policies intended to (1) insure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed[.]

Exhibit D. The concerns of the American Bar Association focus on the lack of competent counsel and calls for the adherence of the guidelines set forth by the ABA which urges that two attorneys be appointed at all stages of a capital case. Id.

3. **Olsson cannot limit or even attempt to request to limit undersigned's role.**

"One of the purposes of [a] Rule 32 is to furnish an evidentiary forum for the establishment of facts underlying a claim for relief, when such facts have not previously been established on the record." State v. Scrivner, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (1982). This does not appear to have been done in Petitioner's Petition for Post-Conviction Relief[6].

"[A]s a matter of fundamental fairness, justice dictates that the defendant be **entitled to the benefit of any reasonable opportunity** to prepare his defense and prove his innocence." Murphy v. Superior Court, 142 Ariz. 273, 689 P.2d 532 (1984) (emphasis added). Petitioner is entitled to the benefit of a genuine Rule 32, not a sham proceeding orchestrated by the prosecution. As stated in Petitioner's Reply to the State's Motion to Vacate, the federal courts have requested that these proceedings be completed not piece-meal, but in an effective, competent manner. French v. United States, 416 F.2d 1149 (1969).

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[6]. Undersigned was only appointed on March 13, 1997. She has not had time to fully review the record, but is in the process of doing so. (However, having to respond to the State's personal attacks on her has hindered this process). This issue will be, if deemed necessary, briefed in a Motion for Rehearing. Rule 32.9(a).

Since Olsson insists on litigating undersigned's role in this case in every Motion he files, undersigned will briefly reply to his "argument" again.

It is highly presumptuous for Olsson to proclaim that the **only** issue left is to "seek review" and that no showing of extraordinary circumstances "could be made here" in order to justify amending Petitioner's Rule 32. Afterall, he is not Petitioner's lawyer and he is not protecting Petitioner's issues and his life, nor is he the Court, who is responsible for making those decisions after each side presents their position.

Olsson states that Ms. Levitt is "an experienced defense attorney." Then he emphasizes that there is no right to effective assistance of counsel in Rule 32 proceedings. Olsson is again mistaken[7].

The Arizona Legislature has recently enacted A.R.S Section 13-4041(B) which sets forth the qualifications needed for counsel representing a capital defendant in post-conviction proceedings[8]. The Arizona Supreme Court has amended Rule 6.8 of the Arizona Rules of Criminal Procedure to comply with that statute and established parallel qualifications. Olsson relies on State v. Mata, 185 Ariz. 319, 337, 916 P.2d 1035, 1053 (May 9, 1996); however that case is now overruled by the enactment of A.R.S Section 13-4041(B) and the amendment to Rule 6.8, effective July 18, 1996 and November 1, 1996 respectively. Petitioner's Rule 32 was filed on January 8, 1997.

4. **Olsson's editorial comments and opinions are improper, willful and have no legal merit.**

Olsson makes gratuitous, slanderous, immaterial and impertinent remarks that

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[7]. Even if this case is pre-enactment, in State v. Krum, 182 Ariz. 108, 893 P.2d 759 (Ariz. App. 1995), vacated on other grounds, 183 Ariz. 288, 903 P.2d 596 (1995). The Court of Appeals said counsel in post conviction proceedings should be effective and competent.

[8]. Undersigned does not concede that because of A.R.S. Section 13-4041 Arizona is an "opt-in" state for the purposes of federal review.

are unprofessional and, in fact, discouraged in the legal profession. Comment to E.R. 3.5 (an advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than [with] belligerence or theatrics). Although the accusations deserve to be ignored, undersigned wishes to highlight them for this Court to demonstrate the unprofessional, disrespectful and improper conduct of the Assistant Attorney General:

1. "Without a doubt, Ms. Ryan's request for a side-kick (from her own law firm) contemplates milking this case for all it is worth as a cash cow." Opposition p.2[9].

2. "Capital ligation is not an unlimited pot-boiler for the enrichment of private attorneys." Opposition p. 3.

3. "[Ms. Ryan] has made it clear from the outset that she does not intend to follow the rules." Opposition p. 3[10].

As indicated in Argument 1 of this Motion, undersigned has never and would never intend to "not follow the rules"; however, undersigned will promise to zealously represent her client. Preamble to the Arizona Rules of Professional Conduct- A lawyer's responsibilities. Undersigned will not violate the code of ethics, but she will not passively allow the State to rush her client to the executioner's block without attempting to obtain the full and fair review that is

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[9]. Undersigned strongly objects to Olsson's characterization of her associate as a "side-kick." She is a licensed attorney in good standing in the State of Arizona and deserves to be treated with respect.

[10].Private lawyers who accept capital cases do not become rich. They pay highly in their personal lives, as well as financially. Olsson should try and support a family and staff (as well as the costs of keeping an office afloat) on court appointed rates and work the hours that these cases require. He should suffer the emotional toll that inevitably results on the attorneys, their staff and their families' lives when these cases are properly litigated.

mandated by the Arizona Supreme Court.

If the State of Arizona wished to merely execute convicted murders, the Arizona Supreme Court would not provide mandatory direct appeals and post conviction proceedings. The Arizona Supreme Court has indicated that it expects that the record in these cases will be **fully** reviewed for fundamental error because of these mandated proceedings.

As recently as March 11, 1997 the Arizona Supreme Court opined:

> We have not conducted a fundamental error review [in this case], nor will we in future cases. This decision rested in great part on the repeal of A.R.S. [Section] 13-4035..., but also on the realization that fundamental review has outlived its necessity... We believe, however, fundamental error review is no longer necessary under modern circumstances. The practice arose in the days of territorial government, when most defendants did not have a lawyer, nor were lawyers required or always appointed by the courts... Thus, **appeals and post-conviction relief as was available were options out of reach for most defendants. When a case was appealed, therefore, fundamental error review served a vital role in protecting the defendant's constitutional rights. Today**, almost all of our counties have a public defender. In addition **we now have a panoply of mandatory protections**- appointment of counsel for trial and appeal, readily available appeals, Anders briefs, post-conviction relief procedures, and **direct appeals and post-conviction review in death penalty cases**... We therefore believe that fundamental review [by the Arizona Supreme Court] is no longer necessary.

State v. Mann, 1997 W.L. 109591, March 11, 1997. (emphasis added).

Therefore, post conviction relief proceedings are even more critical today and the Arizona Supreme Court **expects** them to result in a full review of the facts not previously presented. They do not expect sham proceedings. It is essential that the Petition for Post-Conviction Relief be complete. Id.

The very idea that Olsson is attempting to intercede in Petitioner's right to litigate his case to the fullest extent is not only shocking to the conscious, but repugnant to the soul, and has the appearance of impropriety. This is Petitioner's

only opportunity to present new evidence or challenge what occurred before. Rule 32 of the Arizona Rules of Criminal Procedure. If a full and proper review is not performed, the system fails.

Defense counsel needs all of the vital information necessary for him or her to make informed decisions. Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994). Counsel must conduct a reasonable, informed investigation or make a reasonable decision not to investigate. Id. Otherwise, "strategic decisions based on a mistaken understanding of the facts or law will be grounds for ineffective assistance of counsel. Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). The only way to make reasonable, informed decisions at this stage is to allow undersigned counsel a meaningful opportunity to re-evaluate the prior proceedings, which is the purpose of this whole proceeding. Rule 32.

The Preamble to the Arizona Code of Ethics emphasizes that [a] lawyer should use the law's procedures only for legitimate purposes and not to **harass or intimidate others**." p.2 (emphasis added). These types of personal accusations do not belong in Petitioner's case or in the courtroom at all.

Petitioner has a right to be represented. The State **should** not involve itself in any aspect of a petitioners' representation unless they feel an attorney is not doing his or her job (and not to prevent an attorney from doing their job); then an ethical duty **may** arise. E.R. 8.3(a); Knapp v. Hardy, supra.

...

...

C. CONCLUSION.

For all of the foregoing reasons, Petitioner respectfully requests this Court to grant his Request to Have Co-Counsel Appointed.

RESPECTFULLY SUBMITTED this 31st day of March, 1997.

LAW OFFICE OF CARLA G. RYAN

for CARLA G. RYAN
Attorney for Petitioner

Copy of the foregoing mailed/delivered
this 31st day of March, 1997, to:

The Hon. Judge Borowiec
Cochise County Superior Court
P.O. Drawer CT
Bisbee, AZ 85603

Eric Olsson
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Tucson, AZ 85701

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Arizona Capital Representation Project (informal copy only)
Federal Public Defender's Office
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Pan No. 50204/65139

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Respondent, vs. RICHARD DALE STOKLEY, Petitioner.	No. CR-91-00284A PROSECUTOR MISCONDUCT MOTION AND MOTION TO REMOVE THE ATTORNEY GENERAL'S OFFICE OR, IN THE ALTERNATIVE, TO HOLD THE ATTORNEY GENERAL'S OFFICE IN CONTEMPT AND TO AWARD ATTORNEY FEES (Hon. Matthew W. Borowiec)

Petitioner, RICHARD DALE STOKLEY, by and through his attorney undersigned, hereby respectfully requests this Court to make a finding of prosecutorial misconduct and to remove the Attorney General's Office from representing the State in this case or, in the alternative, to hold the Attorney General's Office in contempt and to award Petitioner attorney fees.

RESPECTFULLY SUBMITTED this 31 day of March, 1997.

LAW OFFICE OF CARLA G. RYAN

By Carla G. Ryan
CARLA G. RYAN
Attorney for Petitioner

3/31/97

MEMORANDUM OF POINTS AND AUTHORITIES

I. Procedural History

Harriett Levitt was originally appointed by Cochise County to handle the Petition for Post Conviction Relief on behalf of Petitioner, Richard Stokley. The Petition for Post Conviction Relief was eventually filed on January 8, 1997. It was summarily dismissed by this Court on March 6, 1997. Thereafter, on March 10, 1997 Ms. Levitt filed a Motion to Withdraw and requested that a new attorney be appointed. The Court proceeded to appoint undersigned on March 13, 1997.

On March 17, 1997 the State filed a Motion to Vacate Dismissal of Counsel or, Alternatively, to Clarify Role of Substituted Counsel. Petitioner responded to the Motion to Vacate on March 21, 1997. At about the same time the State filed an Opposition to Petitioner's Motion to Appoint Co-Counsel. Undersigned promptly replied to that opposition.

II. A Brief Summary of Petitioner's Position on Appointment of Counsel and Co-Counsel

In both of the Responses to the State's Opposition to the appointment of counsel, Petitioner has cited case law right on point. In *Knapp v. Hardy*, 111 Ariz. 107, 523 P2d. 1308 (1974), the Arizona Supreme Court held that a prosecutor had no standing to object

to association of counsel for an indigent criminal defendant. As the court noted, "[not] only does it strike at the very heart of the adversary system...," but it is unseemly" as well. *Id.* citing *State v. Madrid*, 105 Ariz. 534, 468 P2d. 561 (1970). Such participation violates the basic principals of the adversary system in which each side has the right and responsibility to prepare its own case without interference from the other side. *Id.*

The result of the State attempting to interfere with the appointment of defense counsel clearly has the appearance of being improper, as well as violating the constitutional rights of Petitioner and interferes with Petitioner's attorney/client relationship. Afterall, the State should not decide who it will litigate against. If they are allowed that privilege they may as well represent both the state and the defendant because then the "adversary system" would only be "lip service" and not a reality.

Moreover, the manner and tone in which the Oppositions were drafted was unprofessional, disrespectful and slanderous. The accusations were unsupported, vile, mean - spirited and an unnecessary and uncalled for attack on undersigned.

III. Prosecutor Misconduct

A personal attack on defense counsel's integrity can constitute misconduct. *United State v. Foster*, 711 F2d. 871, 883 (9TH Cir. 1983); *United States v. Santiago*, 46 F3d. 885 (9th Cir. 1995). In the present case Eric Olsson has made the following unsupported and unfounded accusations against undersigned:

1. Ms. Ryan "intends to ignore the finality of this Court's order denying the Rule 32 Petition". Opposition. P.2.
2. "Without a doubt, Ms. Ryan's request for a side-kick (from her own law firm) contemplates milking this case for all it is worth as a cash cow." Opposition. P.2.

3. "Capital litigation is not an unlimited pot-boiler for the enrichment of private attorneys". Opposition P. 3.

4. Ms. Ryan "has made clear from the outset that she does not intend to follow the rules". Opposition P.3.

Nothing in the Motions filed by undersigned ever indicated that undersigned intended to ignore any court orders or that she intended to "milk" this case. In fact, the only indications that were made is that she would do the job she was appointed to do. In fact it is common knowledge that capital cases are different and require an extraordinary amount of time. The burden is on the defense attorney to methodically review all aspects of a capital case and to search for fundamental error. *Gardner v. Florida*, 430 U.S. 349, 975 S.Ct. 1993 (1977); *State v. Walton*, 159 Ariz. 571, 769 P2d. 1017 (1989): *State v. Mann*, 1997 W.L. 109591 (March 11, 1997). (see also ABA Standards and NLADA standards attached to Reply to Opposition to Request for Co-Counsel).

It has been estimated that to do a proper Post Conviction Relief proceeding can take 600 hours. (Exhibits A and B). The system fails if defense counsel does not represent a petitioner zealously and if the defense counsel does not do a full investigation and a meaningful review of all of the prior proceedings at this junction.

A prosecutor is not the representative of an ordinary party to a controversy, but rather a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and the prosecutor's interest in a criminal prosecution is not to win a case but to see that justice is done. He is a servant of the law with two aims: that the guilty shall not escape and that the innocent shall not suffer.[1]

[1] This does not just refer to whether a defendant is guilty of a crime, but also whether a defendant

He is in a position where he may prosecute with earnestness and vigor, but while he may strike hard blows, he is not at liberty to strike foul ones. *Berger v. United States*, 195 U.S. 78, 88 (1935).

The statements made in the present case are particularly disturbing because a prosecutor has the responsibility of a minister of justice and not simply that of an advocate; this responsibility carries with it specific obligations to see that a defendant is accorded justice. *State v. Noriega*, 142 Ariz. 474, 690 P2d. 775 (1984); *State v. Fisher*, 141 Ariz. 227, 686 P2d. 750 (1984). Because of this fairness presumption, when Olsson makes such blanket misstatements, he causes a chilling effect on Petitioner's rights. The tone and manner in which these accusations were made also suggest prosecutorial vindictiveness.

Additionally, the tone and phrasing of the accusations are disrespectful. "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." Preamble to the Arizona Rules of Professional Conduct- A Lawyer's Responsibilities. (emphasis added.)

The Arizona Supreme Court has held that "in cases where there has been misconduct of either the prosecution or defense counsel, but reversal is not required [in this case dismissal], the proper remedy will be affirmance [in this case allowing prosecution], followed by the institution of bar disciplinary proceedings against the offending lawyer,.....". *State v. Valdez*, 160 Ariz. 9, 141, 770 P2d. 313, 318 (1989).

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is guilty of a crime, but also whether a defendant deserves the death penalty.

Since the accusations were intentionally made and their effect interferes with Petitioner's constitutional rights, it is respectfully requested that this Court dismiss any criminal proceedings pending and release Petitioner or, in the alternative, remove the Attorney General's Office from further prosecuting this matter and, if this Court deems it appropriate, refer the matter to the Arizona State Bar for possible disciplinary proceedings.

IV. Eric Olsson should be held in Contempt of Court pursuant to *Rule 33 of the Arizona Rules of Criminal Procedure*

Rule 33.1 of the Arizona Rules of Criminal Procedure provides:

> Any person who lawfully disobeys a lawful writ, process, order, or judgment of a court by doing an act or thing forbidden or required, or who engages in any other willfully contemptuous conduct which obstructs the administration of justice, or which lessons the dignity or authority of the court, may be held in contempt of court.

(emphasis added).

The filing of the unfounded accusations against undersigned was willfully contemptuous conduct, which lessens the dignity and authority of the court and was disrespectful to the legal system. Therefore, this Court has the power and discretion to hold Olsson in criminal contempt.

In order to do so this Court, pursuant to *Rule 33.2,* must prepare and file a written order reciting the grounds for such a finding, including a statement that this Court saw the pleadings and read the objectionable material, or, in the alternative, pursuant to *Rule 33.3,* this Court can file a Notice of the Charge and schedule a hearing to compel Olsson to show cause why he should not be held in contempt.

V. Olsson or the Attorney General's Office should be assessed attorney fees on the grounds and for the reasons that they have caused Cochise County to incur additional costs by filing immaterial, impertinent and meritless

Motions.

In order to respond to the Oppositions filed by the State regarding the appointment of Counsel for the completion of his Petition for Post Conviction Relief, undersigned had to research, draft and finalize motions which will cost Cochise County extra attorney fees. The time that was expended by undersigned and her associate on these motions should be paid for by the Attorney General's Office.

Attached as exhibit C to this Motion is an affidavit regarding undersigned's and her associate's time, which was incurred preparing the two Replies and the additional motion. Since the Oppositions were not only willful and intentional, but also meritless, this Court should order that the Attorney General's Office pay for the costs incurred. Ms. Ryan's time should be paid at $50.00 per hour and Ms. Marquez' at $40.00 per hour pursuant to the Cochise County contract for appointment of counsel. Exhibit D. Additionally, any costs incurred on the production of these responses should be charged to the Attorney General's Office as well.

VI. Conclusion

WHEREFORE, based on the foregoing, it is respectfully requested that this Court make a finding of prosecutorial misconduct and hold Olsson in criminal attempt. As a result of this misconduct the Court should either dismiss the prosecution of Petitioner and release him immediately or, in the alternative, remove the Attorney General's Office of any further prosecuting responsibilities in this case. Finally, the Attorney General's Office should be ordered to reimburse the county or to pay directly to the Law Office of Carla G. Ryan the costs and attorney fees incurred in responding to these meritless oppositions.

RESPECTFULLY SUBMITTED this 31 day of March, 1997.

LAW OFFICE OF CARLA RYAN

Carla G. Ryan
Attorney for Petitioner

Copy of the foregoing
mailed this 31 day of
March, 1997 to:

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To be confirmed

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FILED

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

THE STATE OF ARIZONA, Respondent, vs. RICHARD DALE STOKLEY, Petitioner.	Cochise County No. CR-9100284A **REPLY TO MOTION TO VACATE DISMISSAL OF COUNSEL, OR ALTERNATIVELY, TO CLARIFY ROLE OF SUBSTITUTED COUNSEL** (Judge Borowiec)

Petitioner, RICHARD DALE STOKLEY, by and through his attorney undersigned, hereby respectfully requests that this Court deny the State's Motion to Vacate Dismissal of Counsel, or Alternatively, to Clarify Role of Substituted Counsel on the grounds and for the reasons set forth in the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 21 day of March, 1997

LAW OFFICE OF CARLA G. RYAN

By Carla G Ryan
Carla G. Ryan
Attorney for Petitioner

3/21/97

MEMORANDUM OF POINTS AND AUTHORITIES

A. Procedural History[1].

On January 26, 1996, the Arizona Supreme Court issued the Mandate on this case. On this same day the Notice of Post-Conviction Relief was filed by the Clerk of the Arizona Supreme Court, pursuant to *Rule 32, Arizona Rules of Criminal Procedure.* On April 17, 1996, Harriette Levitt was appointed to represent Petitioner in his Post-Conviction proceedings. On January 10, 1997, Ms. Levitt filed a Petition for Post-Conviction Relief (consisting of five pages including the facts). On March 6, 1997 Petitioner's Petition for Post-Conviction summarily was denied.

On March 12, 1997, after Ms. Levitt withdrew, citing irreconcilable differences between her and Petitioner, undersigned was appointed to represent Petitioner "for the completion of his Rule 32 petition." Attachment B. On March 18, 1997 undersigned received the State's Motion to Vacate Dismissal of Counsel or, Alternatively, to Clarify Role of Substituted Counsel (hereinafter "Motion").

B. SUMMARY OF THE ARGUMENTS.

The State has no standing to petition this Court, or any other Court, regarding the appointment of counsel. More importantly, the State has no standing to petition this Court, or any other, to "limit" the role of defense counsel.

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[1]. Petitioner has only set forth the procedural history that is limited to the issue of this Motion.

C. ARGUMENTS.

1. The State has no standing to oppose this Court's appointment of Counsel.

In *Knapp v. Hardy*, 111 Ariz. 107, 523 P.2d 1308 (1974), the Arizona Supreme Court held that a prosecutor had no standing to object to association of counsel for an indigent criminal defendant. As the Court noted, "[n]ot only does it strike at the very heart of the adversary system...," but it is "unseemly" as well. *Id.* citing, *State v. Madrid*, 105 Ariz. 534, 468 P.2d 561 (1970). Such participation violates the basic principles of the adversary system in which each side has the right and responsibility to prepare its own case, without interference from the other side. *Id.*

The State should not be allowed to take a position on the appointment of counsel as it creates the appearance of impropriety because of a clear conflict of interest.

The State is directly interfering with Petitioner's right to counsel. Nowhere in the rule that sets forth appointment of counsel in post-conviction proceedings, does it allow for the consent of the Office of the Attorney General. *Arizona Rules of Criminal Procedure, Rule 32.4(c).* Nor does the statute allow that the Office of the Attorney General outline what defense counsel may or may not file, *Id.*; nor should the rule. The roles of prosecution and the defense are different. There is no way that the prosecution should have any control or input in the defense attorney's representation. *Knapp, supra.* If they have a belief that a defense attorney has violated any ethical rule, the

prosecution can, at the completion of a case, file a complaint with the State Bar Association- just like the defense can do if he/she believes the prosecutor has violated any ethical rules.

The State should not attempt in anyway to control or interfere in the defense of an individual- especially in a capital case. This would have too chilling an effect on any defense lawyer appointed to handle this type of case. A defense lawyer is bound by the law and the ethical rules- the prosecution can not be second guessing a defense lawyer's performance or threatening their job.

Furthermore, if the State is concerned about any potential expense, it is this Court that guards the county's purse, not the Office of the Attorney General. This violates Petitioner's right to have counsel appointed and his right to a fair trial and to put on a defense. *Amendments Five, Six and Fourteen of the United States Constitution.*

2. The appointment of new Counsel is critical in this case[2].

Under the *Arizona Rules of Criminal Procedure, Rule 32.4(c)* Petitioner is guaranteed the assistance of counsel in post-conviction proceedings. December 1, 1993.

The State starts its challenge by asserting that "[t]here is no right to the effective assistance of counsel in Rule 32

[2]. Although it is Petitioner's position that the State does not have standing to object to this Court's ruling, Petitioner does not want to waive any issues; therefore, he will address the merits of the State's Motion; however, he does not concede his position that the State has no standing to oppose this issue.

proceedings." However, in *State v. Krum*[3] 182 Ariz. 108, 893 P.2d 759 (Ariz. App. 1995), the Court of Appeals held that "for the right to counsel to be meaningful, it must encompass effective assistance of counsel." *citing, Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), which has been adopted in Arizona as the standard for effective assistance of counsel. *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985).

The Ninth Circuit Court of Appeals held in *Bonin v. Vasquez*, 999 F2d 425, 429 (1993), that the right to Due Process of Law under the United States Constitution included the right to effective assistance of counsel in post-conviction proceedings in some complex cases. Capital cases are complex. In capital cases, post-conviction proceedings are critical. *Murray v. Giarratano*, 492 U.S. 1 (1989).

In fact, because of the finality of a death sentence, the United States Supreme Court has consistently held that capital cases are different. *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197 (1977). There is a higher standard applied. *Id.*

Not only is Petitioner afforded the right to effective assistance of counsel through the United States Constitution, but also the Arizona Legislature has recently proclaimed their approval. *A.R.S* Section *13-4041(B)* sets forth the qualifications needed for counsel representing a capital defendant in post-

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[3]. This case was later vacated on other grounds by the Arizona Supreme Court in *State v. Krum*, 183 Ariz. 288, 903 P.2d 596 (1995). This part of the Court of Appeals decision was not discussed and therefore not overruled.

conviction proceedings[4] that counsel:

> 1.Has been a member in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.
>
> 2. Has practiced in the area of state criminal appeals or post-conviction for at least three years immediately preceding the appointment.
>
> 3. Did not previously represent the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation.

Furthermore, A.R.S. Section 13-4041(C) states in part:

> The supreme court [Arizona] may refuse to certify... or may remove an attorney from the list who meets the qualifications established under subsection B of this section if the supreme court determines that the attorney is incapable or unable to adequately represent a capital defendant.

In addition, the State in its Motion asserts that Petitioner does not have a right to a "meaningful relationship" with his attorney and that "a complete breakdown of the attorney-client relationship" is no reason to withdraw as counsel. Although it is true that there is no guarantee to a "meaningful relationship", on the contrary, if there is a "total breakdown in the attorney-client relationship, the court would [be] required to dismiss counsel and appoint another attorney." *United States v. Wadsworth*, 830 F.2d 1500 (9th Cir. 1987).

The State asserts that Ms. Levitt is a competent attorney and therefore should continue to represent Petitioner; however, the focus of a conflict between an attorney and a client is not

---

[4]. Undersigned does not concede that because of *A.R.S.* Section *13-4041* Arizona is an opt-In state for the purposes of federal review.

whether counsel is legally competent, but the relationship itself. *United States v. Walker*, 915 F2d 480 (9th Cir. 1990); *Bland v. Calif. Dept. of Corrections*, 20 F.3d 1469 (9th Cir. 1994).

In addition this would violate the ethical rules of professional conduct for lawyers, to force Ms. Levitt to continue to represent Petitioner if a conflict has arisen. The focus of whether Ms. Levitt can withdraw is not 1) any expense that may be incurred by the county or 2) any complaint that the Office of the Attorney General may have. The focus should be whether the withdrawal can be accomplished without a material adverse effect on the interests of the **client**. *Ethical Rule of Professional Conduct 1.16(b)*.

3. **The State has no standing regarding the role of defense Counsel**.

The only person who can limit counsel's role is the client. "A lawyer may limit the objectives of representation if the client consents after consultation." *Ethical Rule of Professional Conduct 1.2(c)*. It would be a conflict of interest if the State, the entity that is prosecuting and attempting to kill Petitioner, were allowed to direct Petitioner's counsel on a course of action she can or can not take. The law allows Petitioner to file a Motion for Rehearing and a Petition for Review. *Arizona Rules of Criminal Procedure, Rule 32.9*. Similarly, much to the dismay of the State, Petitioner may request Leave to Supplement or Leave to Amend; it is this Court's role to either grant or deny any such requests. To limit undersigned's role at this point would violate Petitioner's Fifth Amendment right to counsel, as well as his Due

Process rights. It would also create fundamental error which would require reversal. *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391 (1936); *State v. Woods*, 141 Ariz. 446, 687 P.2d 1201 (1984).

Finally, it would be more efficient to, it needed, raise any other potential issues that Ms. Levitt did not raise at this time. In fact, the federal courts have consistently requested that these proceedings be completed not piece-meal, but in an effective, competent manner. *French v. United States*, 416 F.2d 1149 (1969). It is more efficient to have a complete record for review than to have a case splintered, litigating one issue at a time, costing more money and incurring much more time. The Office of the Attorney General should not object to this proposition, since the prosecution is suppose to be seeking justice, not just convictions[5].

D. CONCLUSION.

For the foregoing reasons, Petitioner respectfully requests this Court to deny the State's Motion to Vacate Dismissal of

...

...

[5]. Justice is not only innocence of the crime, but also the justice of imposing the death penalty. *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992). It is the prosecutor's job to seek justice- to only convict the guilty and not the innocent. Afterall, a prosecutor has the responsibility of a minister of justice and not simply that of an advocate. *State v. Noriega*, 142 Ariz. 474, 690 P.2d 775 (1984); *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984).

Counsel, or Alternatively, to Clarify the Role of Substituted Counsel.

RESPECTFULLY SUBMITTED this 21 day of March, 1997.

LAW OFFICE OF CARLA G. RYAN

Carla G. Ryan

CARLA G. RYAN
Attorney for Petitioner

Copy of the foregoing mailed/delivered this 21 day of March, 1997, to:

The Hon. Judge Borowiec
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ATTORNEYS FOR PLAINTIFF

ARIZONA SUPERIOR COURT
COUNTY OF COCHISE

STATE OF ARIZONA, PLAINTIFF, -VS- RICHARD DALE STOKLEY, DEFENDANT.	CR91-00284A OPPOSITION TO MOTION TO APPOINT CO-COUNSEL (THE HON. MATTHEW W. BOROWIEC)

The State of Arizona strenuously opposes Carla Ryan's motion to appoint co-counsel. This Opposition is supported by the attached Memorandum of Points and Authorities.

DATED this 20th day of March, 1997.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

Eric J. Olsson

ERIC J. OLSSON
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PLAINTIFF

3/20/97

MEMORANDUM OF POINTS AND AUTHORITIES

A. ARGUMENT.

As the State has already argued in its motion of March 17th, 1997, This Court should vacate the appointment of Carla Ryan and reinstate attorney Harriette Levitt as Stokley's Rule 32 counsel. For the same reasons, this Court should reject Ms. Ryan's request for co-counsel. There was no valid basis for allowing Ms. Levitt to withdraw, and her appointment should be reinstated—limited as it is now to the purely legal, review procedures under Rule 32.9(a) and (c) (motion for rehearing and petition for review). Moreover, it is plain from Ms. Ryan's motions that she intends to ignore the **finality of this Court's order denying the Rule 32 petition. She requests additional time and the** appointment of co-counsel to "complete" the petition because "numerous valid [unspecified] issues were not raised," and because Harriette Levitt allegedly was "ineffective" as Rule 32 counsel. (Request for Extension to File a Motion for Reconsideration, dated Mar. 18, 1997.) Without a doubt, Ms. Ryan's request for a side-kick (from her own law firm) contemplates milking this case for all it is worth as a cash cow.

In addition, Ms. Ryan's motion labels this case "extra-ordinary" [sic], but offers nothing to explain why, other than that it is a capital case. *See State v. Bolton*, 182 Ariz. 290, 299, 896 P.2d 830, 839 (1995) (capital case had no "extraordinary circumstances" warranting extra briefing). As mentioned above, all that remains of these proceedings is to seek *review* of this Court's judgment—not to add new claims, which would be precluded under Rule 32.2(2) for failure to raise them in the already-adjudicated petition. Even before judgment is entered, amendments to Rule 32 petitions are not permitted except by leave of the Court, and only "on a showing of extraordinary circumstances." A.R.S. § 13-4236(D). No such showing could be made here. Harriette Levitt, an experienced defense attorney, has already been paid to become familiar with the record and has submitted the claims she deemed worthy. There is nothing extraordinary about submitting the paperwork necessary to preserve those issues for subsequent state and federal review.

Again, there is no right to the effective assistance of counsel in Rule 32 proceedings. *State v. Mata*, 185 Ariz. 319, 337, 916 P.2d 1035, 1053 (1996). Thus, Stokley's and Ms. Ryan's opinions about Ms. Levitt's performance are irrelevant, as were Ms. Levitt's reasons for requesting withdrawal.

This Court should honor its own judgment and reinstate Ms. Levitt for the limited purpose of seeking review. Ms. Ryan should be taken off the case and her motions denied. Capital litigation is not an unlimited pot-boiler for the enrichment of private attorneys.

B. CONCLUSION.

Only the review procedures remain in this Rule 32 action, and there is no good reason to replace Harriette Levitt with another attorney—especially not one who has made clear from the outset that she does not intend to follow the rules. Attorney Ryan should be removed and her motions denied.

RESPECTFULLY SUBMITTED this 20th day of March, 1997.

GRANT WOODS
ATTORNEY GENERAL

ERIC J. OLSSON
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPEALS SECTION

ATTORNEYS FOR PLAINTIFF

COPIES of the foregoing were deposited for mailing this 20th day of March, 1997, to:

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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

THE STATE OF ARIZONA, Respondent, vs. RICHARD DALE STOKLEY, Petitioner.	Cochise County No. CR-9100284A **REQUEST FOR EXTENSION TO FILE A MOTION FOR RECONSIDERATION**

Petitioner, RICHARD DALE STOKLEY, by and through his attorney undersigned, hereby respectfully requests this Court to grant a fifteen (15) day extension to file a Motion for Reconsideration on the grounds and for the reasons set forth in the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 18 day of March, 1997

LAW OFFICE OF CARLA G. RYAN

By Carla G Ryan
Carla G. Ryan
Attorney for Petitioner

...

3/18/97

MEMORANDUM OF POINTS AND AUTHORITIES

On March 6, 19997 Petitioner's Petition for Post-Conviction Relief was denied. Attachment A. On March 12, 1997, after Petitioner's counsel requested to withdraw, citing irreconcilable differences between her and Petitioner, undersigned was appointed to represent Petitioner "for the completion of his Rule 32 petition" by the trial court. Attachment B. After a review of Petitioner's file it has become evident that undersigned should file a Motion for Reconsideration of the Superior Court's denial of the Petition for Post-Conviction Relief because numerous valid issues were not raised in the Petition that need to be addressed, prior counsel improperly and wrongfully argued the standard for a finding of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and because prior counsel was ineffective herself in representing Petitioner during the Post-Conviction proceedings.

Currently the Motion for Reconsideration is due March 21, 1997, fifteen (15) days from the trial court's order. See, Rule 32.9 of the Arizona Rules of Criminal Procedure. A fifteen (15) day extension will make the Motion for Reconsideration due April 5, 1997.

Petitioner respectfully requests a fifteen (15) day extension in order to adequately review the file and prepare the Motion for Reconsideration, as well as to meet and confer with Petitioner. Undersigned is presently scheduled to visit with Petitioner on Friday, March 21, 1997, at the Arizona State Prison in Florence, Arizona.

This request is made in good faith and not to unduly delay the proceedings.

...

For the foregoing reasons, Petitioner respectfully requests this Court to grant his Request For Extension to File a Motion for Reconsideration.

RESPECTFULLY SUBMITTED this 18 day of March, 1997.

LAW OFFICE OF CARLA RYAN

Carla G Ryan

CARLA G RYAN
Attorney for Petitioner

Copy of the foregoing mailed/delivered
this 18 day of March, 1997, to:

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff, vs. RICHARD DALE STOKELY, Defendant.	No. CR- 91-00284 A REQUEST TO HAVE CO-COUNSEL APPOINTED (Hon. Judge Borowiec)

Defendant, RICHARD DALE STOKELY, by and his through counsel undersigned, hereby respectfully requests this court to appoint Leticia Marquez of the Law Offices of Carla Ryan to be co-counsel in the above matter. This matter is a capital case and should be considered extra-ordinary.

It is respectfully requested that she receive $40.00 per hour for the work that she completes on this matter pursuant to the Cochise County Court Administration pay scale.

Undersigned, Carla Ryan, was appointed on March 13, 1997 to represent the defendant for the completion of the Rule 32 Petition that was denied on March 6, 1997.

This request is made in good faith and not to unduly delay the proceedings in this matter.

RESPECTFULLY SUBMITTED this 18 day of March, 1997.

LAW OFFICE OF CARLA RYAN

By Carla G. Ryan
CARLA G. RYAN
Attorney for Appellant

3/18/97

Copy of the foregoing
mailed this 18 day of
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CRIMINAL APPEALS SECTION
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TUCSON, ARIZONA 85701-1367
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(STATE BAR NUMBER 010085)

ATTORNEYS FOR PLAINTIFF

ARIZONA SUPERIOR COURT
COUNTY OF COCHISE

STATE OF ARIZONA,

PLAINTIFF,

-vs-

RICHARD DALE STOKLEY,

DEFENDANT.

CR91-00284A

MOTION TO VACATE DISMISSAL OF COUNSEL OR, ALTERNATIVELY, TO CLARIFY ROLE OF SUBSTITUTED COUNSEL

(THE HON. MATTHEW W. BOROWIEC)

For the reasons stated in the attached Memorandum of Points and Authorities, the State of Arizona respectfully requests that this Court vacate the order replacing Rule 32 counsel Harriette Levitt, or alternatively, clarify the limited role of substituted counsel Carla Ryan.

DATED this 17th day of March, 1997.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

ERIC J. OLSSON
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PLAINTIFF

3/17/97

MEMORANDUM OF POINTS AND AUTHORITIES

A. SUMMARY OF THE ARGUMENTS.

This Court should reinstate attorney Harriette Levitt as Stokley's Rule 32 counsel and should vacate the appointment of Carla Ryan, because this Court has already denied the Rule 32 petition by final order, and because there is no justification for removing one attorney who has already reviewed the record (at Cochise County's expense) for another who has not, simply because Mr. Stokley is dissatisfied with the way Ms. Levitt has handled the case so far. All that remains of the pending action is for counsel who filed the petition to take steps toward seeking reconsideration and/or review by the Arizona Supreme Court. Those duties require neither the approval nor the participation of Mr. Stokley.

B. ARGUMENTS.

1. There should be no replacement of counsel.

There is no right to the effective assistance of counsel in Rule 32 proceedings. *State v. Mata*, 185 Ariz. 319, 337, 916 P.2d 1035, 1053 (1996). Thus, Stokley's alleged dissatisfaction with Ms. Levitt's performance is irrelevant, as are Ms. Levitt's only asserted grounds for withdrawal: references to "a complete breakdown of the attorney-client relationship" and to a concern about "[Stokley's] Rule 32 attorney's effectiveness." (Motion to Withdraw and Order, submitted Mar. 10, 1997.) Even in proceedings where effective representation *is* guaranteed, the guarantee does not extend to a "meaningful" relationship with one's attorney. *Morris v. Slappy*, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617, 75 L. Ed. 2d 610 (1983). Harriette Levitt is a seasoned, experienced criminal defense attorney. Only legal questions remain in the pending proceedings, and Mr. Stokley's dissatisfaction apparently did not arise until he learned the petition had been unsuccessful. Before this Court entered judgment, Ms. Levitt never complained of any trouble preparing or filing the petition.

There is no valid reason for allowing Ms. Levitt to abandon this case at this point on grounds of "ineffectiveness," or for paying yet another defense attorney to review the voluminous record for the first time. This Court should vacate the order allowing Ms. Levitt to withdraw.

2. If counsel is to be replaced, this Court should clarify the limited extent of the appointment.

Alternatively, if counsel is nevertheless to be replaced, this Court should expressly limit the appointment to pursuing the remedies specified under Rule 32.9(a) and (c) (motion for rehearing and petition for review). The Office Administrator's order states that Carla Ryan has been appointed "for the completion of the Rule 32 *petition*," (emphasis added), suggesting that Ms. Ryan might be allowed to supplement the already-adjudicated petition in some manner. The rules do not allow for any such thing, and this Court should make that fact clear to avoid abuse, confusion, and unnecessary expense.

D. CONCLUSION.

Stokley's Rule 32 claims have already been adjudicated, and only the review procedures remain. This Court should vacate its order allowing Harriette Levitt to withdraw and should allow Ms. Levitt a reasonable extension of time in which to seek review if she sees fit. Alternatively, if this Court decides that Carla Ryan's substitution for Ms. Levitt is appropriate, this Court should expressly limit Ms. Ryan's role to the review procedures available under Rule 32.9(a) and (c).

RESPECTFULLY SUBMITTED this 17th day of March, 1997.

GRANT WOODS
ATTORNEY GENERAL

Eric J. Olson

ERIC J. OLSON
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPEALS SECTION

ATTORNEYS FOR PLAINTIFF

COPIES of the foregoing were deposited for mailing this 17th day of March, 1997, to:

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Attorneys for Defendant

CHRIS M. ROLL
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MARYLOU REINHARDT

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PIMA COUNTY COMPUTER No. 34320

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff, vs. RICHARD DALE STOKLEY, Defendant.	NO. CR91-00284A **AFFIDAVIT ACCOMPANYING MOTION FOR COMPENSATION OF APPOINTED COUNSEL** (Final) (Assigned to Judge Boroweic)

STATE OF ARIZONA)
)ss.
County of Pima)

HARRIETTE P. LEVITT, being first sworn says as follows: I was appointed on April 17, 1996 by the Superior Court, State of Arizona, to represent Defendant in his Rule 32 Petition in the above-captioned matter. Counsel withdrew from representation of Defendant due to irreconcible differences on March 13, 1997. To date, the representation has involved the following:

04/19/96	Letter to client	.2
04/19/96	Letter to Ivan Abrams	.2
04/19/96	Letter to Bob Arentz	.2

05/01/96	Collect telephone call from client	.4
05/01/96	Telephone call from Ivan Abrams	.2
06/14/96	Research	2.5
06/16/96	Research	1.0
08/26/96	Review file	2.0
08/14/96	Review file	6.0
08/15/96	Review file	8.0
08/16/96	Review file	4.0
08/19/96	Review file	2.0
08/19/96	Prepare subpoena	.2
08/21/96	Review file	4.5
08/22/96	Review file	2.0
08/23/96	Review file	6.0
09/27/96	Dictate motion to extend Rule 32 deadline	.2
10/03/96	Review letter from client and dictate response	.3
10/21/96	Telephone call to Arizona Capital Representation	.2
10/21/96	Letter to Ivan Abrams	.2
10/25/96	Telephone call to Attorney General	.2
10/25/96	Letter to Ivan Abrams	.2
11/07/96	Dictate motion to extend Rule 32 deadline	.2
12/20/96	Review transcripts	4.0
12/22/96	Review transcripts	6.0
12/23/96	Review transcripts	4.5
12/24/96	Review transcripts	4.5
12/25/96	Review transcripts	5.3

12/26/96	Review transcripts	5.5
12/26/96	Telephone call to Ivan Abrams	.5
12/26/96	Telehpone call to Lynn Foster	.4
12/26/96	Telephone call to Robert Arentz	.5
12/26/96	Telephone call to Perry Hicks	.2
12/26/96	Telephone call to Phillip Maxey	.2
12/26/96	Research	4.0
12/27/96	Draft Rule 32 and affidavits	3.5
12/27/96	Telephone call to Phillip Maxey	.4
12/27/96	Dictate affidvit	.6
12/30/96	Telephone call from Perry Hicks	.3
01/08/97	Letter to Phillip Maxey	.2
01/30/97	Telephone call from DOC	.2
01/30/97	Collect telephone call from client	.3
02/26/97	Review letter from court and client	.5
02/27/97	Review State's opposition, dictate reply	1.0
02/27/97	Letter to client	.3
03/07/97	Review of inquiry from State Bar	.2
03/10/97	Dictate response response to State Bar inquiry	.5
03/10/97	Dictate motion to withdraw	.2
03/13/97	Telephone call from Carla Ryan's office	.2
03/14/97	Conference with Carla Ryan's assistant	.3
	TOTAL HOURS	85.20
	TOTAL FEES @ $45/Hr.	3,834.00
	COSTS: Photocopy charges	72.25
	Long distance	42.83

Postage	.55
Process service	120.00
Records - Sheriff's Department	11.30
TOTAL COSTS	246.93
GRAND TOTAL OF FEES AND COSTS	$4,080.93

RESPECTFULLY SUBMITTED this 17th day of March, 1997.

HARRIETTE P. LEVITT
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 17th day of March, 1997, by HARRIETTE P. LEVITT, Attorney for Defendant.

Darlene Rietz
Notary Public

My Commission Expires:
10/14/2000

OFFICIAL SEAL
DARLENE RIETZ
NOTARY PUBLIC - ARIZONA
PIMA COUNTY
My Comm. Expires Oct. 14, 2000

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PIMA COUNTY COMPUTER No. 34320

Attorney for Bar Number 7077

Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff, vs. RICHARD DALE STOKELY, Defendant.	NO. CR91-00284A **MOTION TO WITHDRAW AND ORDER** (Assigned to Judge Borowiec)

COMES NOW Harriette P. Levitt, undersigned, and hereby moves to withdraw as attorney for the Defendant for the reason that irreconcilable differences have arisen. Defendant has filed complaints against counsel regarding her performance on his Rule 32 proceedings. There has, therefore, been a complete breakdown of the attorney-client relationship.

Since this is a death penalty case, Defendant's Rule 32 petition should be decided on its merits, without collateral issues relating to his Rule 32 attorney's effectiveness.

WHEREFORE, for the foregoing reasons, Harriette P. Levitt respectfully requests this court allow her to withdraw as

3/10/97
3/19/97 stricken

attorney of record for Defendant on his Rule 32 proceedings.

RESPECTFULLY SUBMITTED this 10th day of March, 1997.

HARRIETTE P. LEVITT
Attorney for Defendant

ORDER

Pursuant to the foregoing motion and good cause appearing therefor,

IT IS HEREBY ORDERED that Harriette P. Levitt be and hereby is withdrawn as attorney of record for Defendant on his Rule 32 proceedings and that Carla C. Ryan, Esq. be appointed to represent Defendant in her place and stead.

DATED this 12th day of March, 1997.

HONORABLE MATTHEW W. BOROWIEC

Copy of the foregoing delivered
this 10th day of March, 1996,
to:

Eric Olsson, Esquire
Assistant Attorney General
400 W. Congress, #S315
Tucson, Arizona 85701

And Mailed to:

Richard Stokely, #92408
Arizona State Prison
CB-6
P. O. Box 8600
Florence, Arizona 85232

JAN 13 REC'D

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COPY OF ORIGINAL

FILED
Time_____M
JAN 10 1997
DENISE LUNDIN GLASS
CLERK SUPERIOR COURT
BY_____DEPUTY

Attorney for

Bar Number 7077

Defendant/Petitioner

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA, Plaintiff/Respondent, vs. RICHARD DALE STOKELY, Defendant/Petitioner.	NO. CR-9100284A PETITION FOR POST-CONVICTION RELIEF (Assigned to Judge Borowiec)

COMES NOW, the Petitioner, by and through his attorney undersigned, and pursuant to Rule 32.6, Arizona Rules of Criminal Procedure, submits his Rule 32 Petition. This petition is supported by the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 8th day of January, 1997.

HARRIETTE P. LEVITT
Attorney for Petitioner

1/8/97

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On the Fourth of July weekend, 1991, a community celebration was staged near Elfrida. The focus of these celebrations was the Best Yet Service Station, located near the state highway. Mary Snyder and Mandy Meyers, two teenage girls from Elfrida, were among those in attendance. Petitioner Richard Stokley was also in attendance, performing as a stuntman in the "Old West" reenactment. He was visited at the site by Randy Brazeal.

Mary and Mandy, along with a number of other children, camped out at the service station during the celebration. The youngsters were eventually separated by gender. Mary and Mandy were seen leaving the girls' tent at approximately 1:00 a.m. on July 8, 1991. They were observed entering a car occupied by Petitioner and Randy Brazeal. They were not seen alive again.

Randy Brazeal contacted Chandler police several hours after the crime to confess to his involvement. He stated that he and Petitioner had sexually assaulted and killed the two girls. As a result, Petitioner Richard Stokley was located and arrested at a Benson truck stop by Benson police officers Bunnell and Moncada.

Detective Sergeant Rodney Wayne Rothrock and Detective David Bunnell interviewed Petitioner. During the course of this interview, Petitioner made a full confession of his involvement in the offense. The tape of this confession was played for the jury, and transcripts of the tape were published.

Petitioner admitted to engaging in sexual intercourse with "the brown haired girl", but denied raping her. He also admitted participating in the killings, disposing of the bodies, and burning the girls' clothing. He indicated that Randy Brazeal had been a willing and equal participant in the crimes, having had sex with both of the girls and killing one.

Petitioner later directed law enforcement officials to the scene of the crime. Search and rescue teams were dispatched to the area, and the bodies were recovered from an abandoned, muddy mine shaft.

Autopsies were performed by Cochise County Medical Examiner Dr. Guery Flores. Biological samples were taken from the victims as well as their accused assailants. Dr. Flores determined the cause of death of both victims to have been "manual" strangulation. Although a semen sample was recovered from the body of Mandy Meyers, no such examination was possible on the body of Mary Snyder, because Snyder's body cavities had filled with mud from the mine shaft. As such, it was impossible to verify the identify of her attacker.

Petitioner was charged with two counts of Kidnapping a Minor, two counts of Sexual Assault upon a Minor, two counts of Sexual Conduct with a Minor, and two counts of First-Degree Murder. He was found guilty of all charges. A stipulated sentence of 69 years was set on the "non-capital" offenses. A death sentence imposed on each of the homicide counts.

The Arizona Supreme Court affirmed Petitioner's convictions

and sentences State v. Stokley, 182 Ariz. 505, 898 P.2d 454 (1995) (Exhibit A attached). The Supreme Court found that Petitioner's attorney had made no effort to show actual prejudice of the jury at the time of trial and, therefore, refused to overturn his convictions based on the issue of change of venue. The court found it could not presume prejudice under the facts of the case, and because trial counsel made no effort to show actual prejudice by refusing to pass the panel, there was no basis upon which to find the trial court improperly denied the original motion for change of venue, 182 Ariz at 513-514.

The United States Supreme Court denied Petitioner's petition for writ of certiorari. Subsequently, a notice of post-conviction relief was filed. This court now has jurisdiction pursuant to Rule 32, Arizona Rules of Criminal Procedure.

LEGAL:

I. Ineffective Assistance of Counsel

The standard for determining whether counsel is effective is whether under the circumstances the attorney showed at least minimal competence in representing the criminal defendant. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Schultz, 140 Ariz. 222, 681 P.2d 374 (1984); State v. Watson, 134 Ariz. 1, 653 P.2d 351 (1982). Under this standard our courts have held that whether defense counsel showed minimal competence depends on whether his acts or omissions are a crucial part of the defense. In addition,

counsel's performance will be judged upon the basis of reasonableness under the prevailing professional norms. State v. Nash, 143 Ariz. 392, 694 P.2d 222 (1985).

The defendant who alleges he was denied effective assistance of counsel must "first establish that counsel's errors or omissions reflect a failure to exercise skill, judgment or diligence of a reasonable competent attorney, and second, defendant must establish that he was prejudiced by counsel's errors or omissions." United States v. Hoffman, 733 F.2d 596 at 602, cert. denied 105 S.Ct. 521, 469 U.S. 1039, 83 L.Ed.2d 409.

One of the most persuasive issues available to Petitioner on appeal was the court's denial of his motion for change of venue. Defense counsel, however, failed to properly preserve that issue for appeal by failing to object to the jury panel at the time of jury selection. The Arizona Supreme Court found that because of this failure there was nothing in the record to indicate that Petitioner still felt the jury panel was unfairly prejudiced against him.

It is submitted that trial counsel fell below the standards for minimal competence in the legal community by failing to preserve this important issue for appeal.

Appellate counsel, Ivan Abrams, argued this issue as fundamental error but failed to cite any provisions of the Federal Constitution which applied to this issue. As a result, the State successfully argued in its opposition to the petition

for certiorari to the United States Supreme Court, that Petitioner had failed to preserve this issue as a Federal Constitutional issue in the State Court, and was, therefore, precluded from raising it at the Federal level.

II. Suppression of Brady Material.

During the initial period of defense investigation of this case, Randy Brazeal was represented by Perry Hicks. Mr. Hicks, through his investigator Lynn Foster, uncovered evidence which tended to establish that Randy Brazeal was involved in a satanic cult in Elfrida. Foster also observed that Brazeal displayed satanic tatoos on his body.

In a telephone conversation with counsel undersigned on December 27, 1996, Mr. Foster revealed that he provided daily reports of his activities on this investigation to Mr. Hicks. Mr. Hicks subsequently disclosed the results of this investigation to Alan Polley, the county attorney. Thereafter, Brazeal entered into a plea bargain and further investigation on this issue ceased.

Counsel undersigned also contacted Robert Arentz, who represented Petitioner at trial. Mr. Arentz feels that he was at sometime aware of Mr. Foster's theory of the case but that the evidence had not been disclosed to him prior to trial. Mr. Arentz also stated that the existence of such evidence would have been useful to impeach Randy Brazeal's credibility, inasmuch as the defense theory of the case was that Brazeal was the planner and ring leader and primary actor in the crimes. Mr.

Arentz agreed that evidence linking Brazeal to a satanic cult would have also been helpful to prove this theory of the case and possibly secure a more lenient sentence for Appellant.

A colorable claim for newly discovered evidence is present if: evidence appears on its face to have existed at time of trial but was discovered after trial; the motion alleges facts from which the court can conclude that defendant was diligent is discovering facts and bringing them to the court's attention; evidence is not simply cumulative or impeaching; evidence is relevant to the case; and evidence is such that it would likely have altered the verdict, find, or sentence if known at the time of trial. State v. Maryland, 162 Ariz. 51, 781 P.2d 28 (1989).

In the instant case, the reports constitute exculpatory evidence which existed at the time of Petitioner's trial. It should have been disclosed pursuant to Brady v. Maryland, 373 U.S. 83 (1963). The reports were never disclosed to defense counsel.

It is submitted that the State's failure to disclose this evidence violates Brady v. Marilyn and that Petitioner is, therefore, entitled to a new trial.

RESPECTFULLY SUBMITTED this 8th day of January, 1997.

HARRIETTE P. LEVITT
Attorney for Petitioner

VERIFICATION

STATE OF ARIZONA)
) ss.
County of Pima)

HARRIETTE P. LEVITT, being first duly sworn upon her oath, deposes and says:

That she is the attorney for Petitioner in the above entitled and captioned matter;

That she has read the foregoing Petition for Post-Conviction Relief and knows the contents thereof; that the information contained therein was provided to her by Petitioner; that the same are true and correct to the best of her knowledge, information and belief; and that pursuant to A.R.S. Section 13-4235, this Petition contains all known grounds for relief under Rule 32.

HARRIETTE P. LEVITT

SUBSCRIBED AND SWORN TO before me this 8th day of January, 1997, by HARRIETTE P. LEVITT, attorney for Petitioner herein.

Notary Public

My Commission expires:

NOTARY PUBLIC
PIMA COUNTY
Shelley MartindelCampo
My Commission Expires: 3-10-2000

Copy of the foregoing delivered this 8th day of January, 1997, to:

Deputy County Attorney
Drawer CA
Bisbee, Arizona 85603

ER - 879

And Mailed to:

Richard Dale Stokely, #92408
Arizona State Prison
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